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1 (Caption omitted)

2 In the United States District Court, Eastern District of Texas, Texarkana Division

No. 262

MARTON L. WHELCHEL, PETITIONER

vs.

A. McDONALD, WARDEN, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Randolph Bryant, Judge of Said Court:

Your petitioner, Marton L. Whelchel, respectfully represents:

1. That he is (and was during all of the time herein mentioned) a citizen of the United States of America and a citizen of the State of Texas.

2. That A. McDonald is the duly appointed and acting warden of the Federal Correctional Institute at Texarkana, Texas.

3. Petitioner states that he is 25 years of age, unmarried, and with a widowed mother, Mrs. Ebby Whelchel, whose address is Queen City, Texas; that he was born in East Texas in Cass County, Texas, and lived there until he was inducted into the army at Texarkana, Texas, on the 15th day of January, 1941; that he was assigned to various units and on the 12th day of April, 1945, he was a Private in Company C, 602nd Tank Destroyer Battalion; that as a soldier and member of the 602nd Tank Destroyer Battalion he participated in the Normandy Invasion and drive through Northern France and numerous battles in Northern France and Germany; that he was engaged in combat continuously from August, 1944, until March, 1945, at which time he was accused of rape and arrested and tried before Court-Martial on April 10, 1945; that on April 10, 1945, he was arraigned and tried before said Court-Martial;
3 that he was found guilty and sentenced to death; that afterwards, the death sentence was reduced to life imprisonment and afterwards, in 1947, the sentence was reduced to twenty-one years; that under said sentence he is now being held in the United States Correctional Institute at Texarkana, Texas.

4. Petitioner says that he is not guilty of the charges against him and has at all times maintained his innocence; that petitioner verily believes that at the time of the alleged occurrence, he was totally incapacitated mentally. Petitioner further says that by reason

of his service he is informed and verily believes that he had "cracked up" shortly before the alleged occurrence in which he was charged with rape; that he is further informed and verily believes that, if, in fact, the act of rape occurred, he was suffering from total amnesia and knew nothing of the happenings and knows nothing now of the same, if, in fact the said happenings did occur as charged against him; that petitioner is informed and verily believes that the state of his mind was such at the time the charges were brought against him that he could not fully appreciate the gravity of the situation and refused to cooperate with counsel appointed to defend him, believing in his own mind that the offense had not occurred so far as he was concerned and refusing to be alarmed at the charges.

5. Petitioner alleges that the Court-Martial that tried him was without authority in law in that the act of Congress providing for Courts-Martial and the Manual for Courts-Martial were void and of no effect because of no provision therein for a trial of a private soldier before a court composed of at least some members of his own class; but, on the contrary, the court was composed, and the law provided for the court to be composed of, superiors of petitioner, only; that is, commissioned officers; that the said provisions of the law establishing Courts-Martial and the provisions of the Manual for Courts-Martial providing for officers only to compose the
4 said court is unconstitutional and void under the 5th and 9th Amendments of the Constitution of the United States; in that the petitioner was denied the right of trial before his peers, the fundamental right of all English speaking peoples since Magna Carta, and firmly established in American jurisprudence at the time of the adoption of the said 9th Amendment.

5a. Petitioner further alleges that the proceedings before the Court-Martial were void and of no effect because the set-up under the Code and set forth in the Manual for Court-Martial is unconstitutional, in that the procedure set forth does not allow an accused before said court representation upon said court from his class; further, that procedure provides that the accused shall have no voice in the selection of the membership of the said court, but the same is placed in the hands of the General in command who appoints the court from officers under him, appoints counsel for the prosecution and appoints counsel for the defense without giving the accused any voice therein, whatsoever; that by reason of the said procedure, courts-martial have become, and were at the time petitioner was tried, a mere formality whereby the commanding general was empowered to visit summary punishment upon the accused. The entire membership of the court and the officers appointed, by reason of fear of displeasure of their commander being under coercion and restraint to such extent that they could not render a fair and im-

partial trial to the accused; that the said prosecution violates the Fifth Amendment to the Constitution of the United States in that a trial by court-martial such as petitioner had in this case deprives petitioner of his rights under said Fifth Amendment and deprives him of his liberty without due process of law; that the said prosecution is so unfair and unjust as to violate the fundamental concepts of a fair and impartial trial guaranteed by the Fifth Amendment to all persons being tried in courts of the United States.

5 6. Petitioner further alleges that after the trial and he was found guilty, it came to the attention of his counsel that there was a question of whether or not at the time of the alleged commission of the offense, the petitioner was in such state of mind as to know the nature and consequence of the acts, whereupon, counsel for the petitioner made application for neuropsychiatric examination of petitioner and his request was concurred in by five members of the Court-Martial; that the said examination was granted and Captain Nino M. Pellettieri, Surgeon, 602nd Tank Destroyer Battalion, made a neuropsychiatric examination of the petitioner and reported his findings on April 23, 1945, that petitioner was suffering from total amnesia and knew nothing of the whole incident; that there was no provision of the law whereby the Court-Martial that tried petitioner could grant a new trial and reconsider the newly discovered evidence as shown in the report of Captain Pellettieri, together with statements from First Lieutenant Robert E. Graham and Sergeant Harry P. Goolsby, dated April 24, 1945, wherein Lieutenant Graham stated that in his opinion Private Whelchel was mentally unstable, and also a statement of Sergeant Goolsby to the effect that Private Whelchel had theretofore "cracked up" mentally; that the failure of the law to provide for a new trial by the Court-Martial deprived the petitioner of his rights under the due process clause of the Constitution of the United States; that, thereby, the said judgment and conviction of petitioner was wholly void and of no effect.

7. Petitioner further alleges that upon his information and belief that there was no thorough and impartial investigation of the charges before his case was referred to the General Court-Martial as provided by law and by the Manual for Courts-Martial, Section 35, in that there was no thorough and impartial investigation made of the mental condition of petitioner before the said charges were made; that had there been a thorough and impartial investigation

6 it would have resulted in a finding that petitioner, at the time of the acts complained of, was suffering from total amnesia, having previously had a "crack up" by reason of the severe strain from Normandy through France and Germany; that the failure to have the said thorough and impartial investigation

was a denial of the rights to petitioner under the due process clause of the Constitution of the United States.

8. Petitioner further alleges that the reviewing authority abused its discretion in its failure to order a new trial for petitioner on the ground that petitioner's mental condition was not such as to be sufficient to charge him with responsibility for his acts; that the reviewing authority had before it the report of Captain Pellettieri and the statements of Lieutenant Robert H. Graham and Sergeant Harry P. Goolsby, but arbitrarily and intentionally disregarded same; and which said arbitrary and intentional acts deprived petitioner of his rights under the due process provision of the Constitution of the United States.

9. Petitioner further alleges that he should not have been tried by the said Court-Martial at the time he was tried because the Court-Martial had information upon which said court should have suspected insanity of petitioner, both at the time of the alleged occurrence of the acts charged as constituting the offense, and at the time of trial, and should have proceeded under Paragraph C of Article 35 of the Manual for Courts-Martial, United States Army, page 26; that a thorough investigation would have disclosed the facts as set forth in the report of Captain Pellettieri and the statements of Lieutenant Graham and Sergeant Goolsby, as aforesaid; that after the trial and before the review by the Judge Advocate General's Department, affidavits were submitted and a report of a psychiatrist, all showing the bad mental condition of petitioner and giving notice sufficient under Paragraph C, Article 35, of the Manual for Courts-Martial, U. S. A., to have put the reviewing authorities upon notice of the condition of the petitioner, whereby it became the duty of the Judge Advocate's Department to order a thorough investigation and have a thorough neuropsychiatric examination of the petitioner before affirming the case; further the said reviewing authorities had before them a recommendation by five members of the Court-Martial which tried petitioner concurring in a request by petitioner's counsel that the case be re-opened and the petitioner be admitted to a hospital for a thorough neuropsychiatric examination, but said reviewing authorities arbitrarily and intentionally ignored the same and approved the death penalty for petitioner; that, therefore, the petitioner was deprived of his rights under the due process clause of the Constitution of the United States, in that the Court-Martial and the reviewing authority failed and refused to follow the provisions of the law as aforesaid.

10. Petitioner further alleges that the Adjutant General and the Judge Advocate General of the United States are in possession of

all the records, data, material, documents and correspondence pertaining to the trial of the petitioner and which said information is sorely needed by petitioner in order to present his case to this court.

11. Petitioner further alleges that the procedure in his trial amounts to a denial of due process of law provided for by the Fifth Amendment of the Constitution of the United States; that in the entire proceedings there was total failure to observe that fundamental fairness essental to the very concept of justice; that the acts both of the trial Court-Martial and of the reviewing authorities were arbitrary and unfair to such an extent that the whole trial was infected and prevented a fair trial.

12. Premises considered, petitioner alleges that the acts and conduct of the Court-Martial before which he was tried were null and void; that respondent is illegally holding petitioner in custody and depriving him of his liberty, contrary to the Constitution and laws of the United States.

8 Wherefore, petitioner prays this honorable court to issue Writ of Habeas Corpus directing respondent to produce petitioner before this court for a hearing and determination of the issues made as hereinbefore set forth; that an immediate hearing of this petition be had; for an order subpoena duces tecum to the Adjutant General and Judge Advocate General of the War Department of the United States at Washington to produce before this court all records, documents and information of every kind in the files of the said department pertaining to this cause; that on final hearing, the court enter judgment and decree vacating and setting aside petitioner's conviction and sentence and ordering petitioner discharged from further imprisonment.

(S.) MARTON L. WHELCHEL,
Petitioner.

HUGH CARNEY,
Atlanta, Texas.

Duly sworn to by Marton L. Whelcher. Jurat omitted in printing.

9 In the District Court of the United States

[Title omitted]

ORDER TO SHOW CAUSE—Filed January 13, 1949

The above entitled matter having this day been presented to me, it is

ORDERED that the Respondent show cause, if any, at Texarkana, Texas, at 2 P.M. upon Monday, January 17, 1949, why the writ of habeas corpus should not be granted.

Thus done and ordered at Sherman, Texas, this 13th day of January, 1949.

(S.) RANDOLPH BRYANT,
United States District Judge.

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10 In the District Court of the United States

[Title omitted]

ANSWER OF RESPONDENT—Filed February 18, 1949

Comes A. McDonald, Warden of the Federal Correctional Institution, Texarkana, Texas, and makes answer to the order to show cause why a writ of habeas corpus should not issue, and for return and answer says:

He holds said Marton L. Whelchel in custody in the Federal Correctional Institution at Texarkana, Texas, by virtue and under the authority of General Court Martial Order No. 388, Headquarters United States Forces European Theatre, dated September 6, 1945, copy of which is hereto annexed as Exhibit "A" and made a part hereof, as modified by succeeding orders and designations of places of confinement, all as evidenced by a record of court commitment, copy of which is hereto annexed as Exhibit "B" and made a part hereof.

Upon information and belief Respondent says that Petitioner was tried before a General Court Martial appointed by Commanding General 89th Infantry Division on charges of rape, in violation of the 92nd Article of War, and assault with intent to commit rape, in violation of the 93rd Article of War. Said Petitioner was found guilty as charged and was sentenced to be hung by the neck until dead. The above sentence was approved by the reviewing authority and was confirmed by the confirming authority, but was commuted to "dishonorable discharge from the service, forfeit of all pay and allowance due or to become due, and confined at hard labor for the

term of his natural life". Said term of confinement on July 16, 1947, by direction of the President was reduced to 21 years.

Petitioner is presently engaged in serving said sentence
11 of confinement in custody of Respondent.

In answer to the several allegations of Petitioner, Respondent admits, denies and explains as follows:

1

Respondent admits allegations of paragraph No. 1.

2

Respondent admits allegations of paragraph No. 2.

3

Respondent admits so much of the allegations of paragraph No. 3, as allege that Petitioner was tried before a Court Martial on April 10, 1945, and was found guilty and sentenced to death, that said sentence was subsequently commuted to life imprisonment, and later reduced to confinement for 21 years, and that Petitioner is now being held by Respondent under said *said* sentence.

Respondent neither admits nor denies the other allegations of Paragraph No. 3, having no knowledge thereof.

4

Respondent denies the allegations of paragraph No. 4.

5

Respondent denies the allegations of paragraph No. 5.

5a

Respondent denies the allegations of paragraph No. 5a.

6

Respondent denies the allegations of paragraph No. 6.

7

Respondent denies the allegations of paragraph No. 7.

8

Respondent denies the allegations of paragraph No. 8.

9

Respondent denies the allegations of paragraph No. 9.

10

Respondent has available for the use of Petitioner and the Court authenticated copies of the proceedings of the Court
12 -Martial.

11

Respondent denies the allegations of paragraph No. 11.

12

Respondent denies the allegations of paragraph No. 12.

Further answering, upon information and belief Respondent says that all proceedings prior to, during and subsequent to the trial of Petitioner by General Court Martial were legal, lawful and proper in all respects, and at all stages petitioner was afforded every right and privilege to which he was entitled.

Further answering, Respondent says that the Petitioner has filed to exhaust the remedies provided by statute before recourse to this Court in habeas corpus, in that he has not petitioned the Judge Advocate General for a new trial under the provisions of Article of War 53 (Sec. 230, Title 11, Public Law 759, 80th Congress; Act of June 24, 1948, 62 Stat. 627) and the procedure established by the President in Chapter XXII of the Manual for Courts-Martial, U. S. Army, 1949 (page 7550, Federal Register, Vol. 13, No. 238, December 8, 1948; page 119, Federal Register, Vol. 14, No. 7, January 11, 1949).

(S.) A. McDONALD,
Warden, Federal Correctional Institution, Texarkana, Texas.

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13 EXHIBIT "A" TO ANSWER

RESTRICTED

HEADQUARTERS
U. S. FORCES, EUROPEAN THEATER

General Court-Martial
Orders No. 388

6 Sep. 1945.

Before a general court-martial which convened at Immerath, Germany, on 10 April 1945, pursuant to paragraph 1, Special Orders

No. 32, Headquarters 89th Infantry Division, 26 March 1945, was arraigned and tried:

Private *Marton L. Whelchel*, 18038433, Company C, 602d Tank Destroyer Battalion.

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Marton L. Whelchel, Company C, 602nd Tank Destroyer Battalion, and Tec 5 Elmer L. Spohn, Company C, 602nd Tank Destroyer Battalion, acting jointly and in pursuance of a common intent, did, at Immerath, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of

CHARGE II: Violation of the 93rd Article of War.

Specification: In that Private Marton L. Whelchel, Company C, 602nd Tank Destroyer Battalion, did, at Immerath, Germany, on or about 14 March 1945, with intent to commit a felony, viz. rape, commit an assault upon , by willfully and feloniously removing her step-ins from and throwing the said on a bed.

PLEAS

To all the Specifications and Charges: NOT GUILTY.

FINDINGS

Of all the Specifications and Charges: GUILTY.

SENTENCE

To be hanged by the neck until dead. (No previous convictions considered.)

The sentence was adjudged on 10 April 1945.

The action of the convening authority is:

"HEADQUARTERS 89TH INFANTRY DIVISION

Office of the Division Commander
APO 89, U. S. Army

19 April 1945

In the foregoing case of Private Marton L. Whelchel, 18038433, Company "C", 602d Tank Destroyer Battalion, the sentence is approved and the record of trial forwarded for action under Article of War 48.

14-17

(S.) THOMAS D. FINLEY,
(T.) THOMAS D. FINLEY,
Major General, U. S. Army,
Commanding."

The action of the confirming authority is:

"HEADQUARTERS
EUROPEAN THEATER OF OPERATIONS
UNITED STATES ARMY

In the foregoing case of:

Private Marton L. Whelchel, 18038433,
Company C, 602d Tank Destroyer Battalion,

the sentence is confirmed, but, owing to special circumstances in this case, is commuted to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The U. S. Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld.

(S.) DWIGHT D. EISENHOWER,
(T.) DWIGHT D. EISENHOWER,
General of the Army, U.S.A.,
Commanding.

7 June 1945."

The sentence, having been approved by the convening authority, confirmed and commuted by the Commanding General, European Theater of Operations, and Article of War 50½ having been complied with, as so commuted, will be duly executed. (CM FTO 12873)

BY COMMAND OF GENERAL EISENHOWER:

W. B. SMITH,
[SEAL.] *Lieutenant General, USA, Chief of Staff.*

R. B. LOVETT,
Brigadier General, USA, Adjutant General.

DISTRIBUTION: M.

18-19 In the District Court of the United States, for the Eastern District of Texas, Texarkana Division

Civil Action No. 262

MARTON L. WHELCHEL, PETITIONER

vs.

A. MCDONALD, WARDEN, RESPONDENT

Reporter's Transcript of Hearing

APPEARANCES:

For the Petitioner: Mr. L. F. Denison, Mount Pleasant, Texas; Mr. Hugh Carney, Atlanta, Texas.

For the Respondent: Lt. Col. Nicholas R. Voorhis, J. A. G. O., Washington, D. C.; Mr. Steve M. King, United States Attorney, Beaumont, Texas.

Be it Remembered, that upon the 18th day of February, A. D., 1949, came on to be heard in the above entitled and numbered cause a Habeas Corpus hearing before His Honor, Randolph Bryant,
20 Judge of the District Court of the United States for the Eastern District of Texas, situated and holding Regular Term at Tyler, Smith County, Texas; and,

That the following is a substantially true and correct transcript of the proceedings had during said hearing, with the exception that Respondent's Exhibit 1, being Court-Martial record of Petitioner, is not copied herein, but is being sent up in the original form introduced during said hearing; i.e.: photostatic copy.

MR. KING: Your Honor, I would like to have the Colonel here appear as counsel for the United States.

THE COURT: Yes. He is permitted to appear as a matter of comity.

MR. CARNEY: Your Honor, I have had Mr. Benson summonsed as a witness, and I would like to get his assistance in the trial of the case, be added as counsel.

THE COURT: All right.

MR. CARNEY: Would the Court like to hear a brief statement of the case?

THE COURT: Yes. I would like for you to outline the case.

STATEMENT OF CASE

Mr. CARNEY: This is a petition by Marton L. Whelchel, the young man sitting over here, in Habeas Corpus against his
21 detention in the Texarkana Correctional Institution. Marton L. Whelchel was in the Army and he was in Patton's Army in Germany. And about April 10, 1945, he was charged with rape on a German girl and was tried before a Court-Martial at Immerath, Germany, and was convicted and given the death penalty. Through the intervention of some of his friends, Congressman Patman, General Eisenhower reduced that to life imprisonment and he was sentenced to life imprisonment in the United States, and was confined at the Federal Penitentiary at Terre Haute.

The COURT: Tell me what happened. Was there a hearing upon the merits on that application before the District Judge up here?

Mr. CARNEY: No sir. That application was dismissed without prejudice.

The COURT: Well, as I recall the record, that application for writ was presented and denied and I thought an appeal perfected from it.

Mr. CARNEY: No. It was never passed on.

The COURT: And the appeal was dismissed?

Mr. CARNEY: There was never any appeal.

The COURT: Never was any hearing held upon the merits?

Mr. CARNEY: None at all. The writ was issued and the case was set for trial, but pending that setting, why, I found out——

22 The COURT: Well, there was no adjudication whatever?

Mr. CARNEY: No adjudication whatever, and I have an order here withdrawing it without prejudice.

The COURT: All right.

Mr. CARNEY: Dismissing it without prejudice.

The COURT: All right.

Mr. CARNEY: So that matter doesn't stand in the way at all. Now, at this trial at Immerath, Germany, on April 10, 1945, the defendant was represented by an appointed officer, Captain Madison, who doesn't appear to be a lawyer, but he represented him. The trial was very short. The record of the trial is here before the Court, all the testimony, and there was some testimony from the defendant's standpoint showing an alibi, but very weak; wasn't much to it I'll admit that, and he was convicted and given the death penalty, as I say. Now, shortly after he was convicted this man who represented him, Captain Madison—it was called to his attention that this boy wasn't in his right mind, possibly at the time.

The COURT: I remember the claim of amnesia, as I recall it.

Mr. CARNEY: Yes, and he had him examined by Dr. Pellettieri, the surgeon for the battalion. Dr. Pellettieri made a report in writing that in his opinion this boy was suffering from amnesia, of

the whole incident. In addition to that Madison obtained a
23 statement from his presiding officer, Lieutenant—now Captain —who is present here, Captain——

The COURT: What is your name, Captain?

Captain ROBERT GRAHAM: Captain Robert Graham.

Mr. CARNEY: Captain Robert Graham. Captain Graham made a statement in his opinion that this boy wasn't in his right mind at the time of the trial or at the time of the alleged incident.

The COURT: Was Captain Graham a member of the court-martial?

Mr. CARNEY: He was just this boy's immediate superior. Also Madison obtained a statement from Sgt. Goolsby who was a companion sergeant to this boy in the Army and had been with him all the way through, and Goolsby said in his statement that about two weeks before this incident the boy cracked up. And those things were presented to the court-martial after the court-martial trial, and five members of the court-martial said that the case ought to be reopened in spite of these things that went into the record and in spite of those the reviewing authorities refused to give him a psychiatric examination and reopen the case. Our whole point is that the court-martial law is unconstitutional.

The COURT: What do you base that on?

Mr. CARNEY: On this fact. The court-martial is composed of officers only.

24 The COURT: You needn't argue that.

Mr. CARNEY: I am not going to argue it, but the whole thing together makes it unconstitutional. It is composed of a class of officers only, men who have in mind not the things about seeing that a man gets a fair trial.

The COURT: I don't agree with that statement at all. You needn't waste any time arguing that.

Mr. CARNEY: I am going to offer proof of that.

The COURT: You can offer proof.

Mr. CARNEY: I am going to offer proof by the examining committee who changed the law and made it a law that an enlisted man can sit on the court.

The COURT: All right.

Mr. CARNEY: In addition to that, we say that being composed strictly of officers, the court is appointed by the General in command, the personnel of the court, the prosecuting attorney is appointed by the General, defense counsel is appointed by the General, and the whole set up and scheme is to go through with a formality there to maintain discipline in the Army regardless of the rights of the defendant.

The COURT: Well, all right.

Mr. CARNEY: Now, that is the point we make on that.

The COURT: All right.

Mr. CARNEY: But in this case, in this particular case, we say that the law was violated, the court-martial law was violated in this trial.

The COURT: You had better bear down on that because that is——

Mr. CARNEY: Naturally, Your Honor, I don't want to pass this other point up though.

The COURT: Well,——

Mr. CARNEY: That is the main point.

The COURT: All right. Now, what in general is your answer to this?

Mr. CARNEY: Let me read this just a moment, which portion we say——

The COURT: I thought you were just making your opening statement now. But we will go on with the hearing and the evidence in a minute.

Mr. CARNEY: Just a little short item here.

The COURT: All right.

Mr. CARNEY: This code is very solicitous of the fact that a man might not be in his right mind. There are many paragraphs. I am not going to read them all. But this one: "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial, or of how it was determined if raised."

The COURT: All right.

Mr. CARNEY: Now, we say that when they refused to consider these statements of the doctor and of the Captain and of the Sergeant that this man was insane and the recommendation of five members of the Court, they violated this provision of this court-martial code.

The COURT: All right.

STATEMENT BY COUNSEL FOR RESPONDENT

Col. VOORHIS: Your Honor please, in general the defense will show that the interpretations which Petitioner's counsel has put on several letters is a very generous interpretation, and the letters do not say what he summarizes them as saying, in that the Company Commander in his letter attached to the letter of the defense counsel did not say that Whelchel was at any time insane. His sergeant did not say he was insane. The battalion surgeon did not say he was insane. The defense counsel after trial did make a request that the Petitioner, Whelchel, be given a psychiatric examination. He apparently made that request without knowledge of the fact that prior to trial on March 25th—and the trial was April 10th—on March 25th

he had received a thorough psychiatric examination by a neuropsychiatrist, which the battalion surgeon was not. The court after trial in concurring in the recommendation obviously had no knowledge that he had been accorded a thorough psychiatric examination prior to the trial. The request of the defense counsel
27 reached the reviewing authority after the reviewing authority had acted and approved the sentence and forwarded it for appellate review under the statute. It did reach theatre headquarters, General Eisenhower's headquarters, prior to his action on it, and his action shows that due to the unusual circumstances in this case he commuted the sentence on the recommendation of the theatre staff judge advocate. The man's condition due to alcohol on that evening was a contributing factor to his acts. Our position is that Whelchel was accorded every right and privilege to which he was reasonably entitled and at no stage of the proceedings was in any way denied anything to which he was entitled.

The COURT: That is a very clear statement of your position.

Mr. CARNEY: Your Honor, I would like to get a stipulation from counsel. You will agree that that psychiatric examination was never made after the statement I read into the record was presented?

Col. VOORHIS: Petitioner's counsel says the record of the trial was before the Court. I don't know whether it was or not, but I have here an authenticated copy of the entire record, the processing of the charges before trial, the appellate reviews and the consideration that took place. Included in it are the statements to which he referred.

28 The COURT: That will be admissible in evidence.

Mr. CARNEY: Yes. I have carefully read it over and there is not a word in it about the psychiatric examination after the first one.

The COURT: I think that record will be the best evidence we can have of the proceedings. It is admissible in evidence. But go ahead with your testimony.

Col. VOORHIS: I can offer it now for the use of Petitioner or later in the Respondent's case.

The COURT: That is just with you gentlemen. It will be admitted.

Mr. CARNEY: I have a copy of it.

Col. VOORHIS: Respondent's Exhibit 1.

(Photostatic copy of Court-Martial proceedings in question marked Respondent's Exhibit 1.)

Mr. CARNEY: I have special copies here taken from the record of these and I don't care, of course, to have to put in all that record, and if you will agree to let copies go in here—for instance, here is Robert Graham's statement.

Col. VOORHIS: Read the copies and the statements are in evidence.

The COURT: The statements are in evidence.

Col. VOORHIS: An easy way to refer to these exhibits is by a pencil paging in the lower right hand corner which runs consecutively, and Graham's statement is shown on page 132.

29 Mr. CARNEY: I have the page number of the records. I want to introduce the deposition of Dr. Pellettieri. This was taken on a waiver, Your Honor.

The COURT: I understand that. Does he claim to be a psychiatrist?

Mr. CARNEY: No, he is not. He is just a general medical practitioner.

ANSWERS OF DR. NINO M. PELLETTIERI TO DIRECT INTERROGATORIES PROPOUNDED BY PETITIONER

NINO M. PELLETTIERI, having been duly sworn, makes the following answers to direct interrogatories one to fourteen, inclusive, propounded to him by Petitioner in the above entitled and numbered cause:

DIRECT INTERROGATORY No. 1.

Please state your name, age and address.

ANSWER TO DIRECT INTERROGATORY No. 1.

Nino M. Pellettieri; age 43; 1126 North Latrobe, Chicago, Illinois.

DIRECT INTERROGATORY No. 2:

Please state what is your profession and how long you have been engaged in this profession and the degrees, if any, you have.

ANSWER TO DIRECT INTERROGATORY No. 2.

30 Physician; have been in the practice sixteen years. Have B.S. and M.D. degrees from Loyola and the A.B. from Creighton College.

DIRECT INTERROGATORY No. 3:

Have you specialized in any mental diseases or neuropsychiatric practice? If so, give the extent in length of time and experience had in such practice.

ANSWER TO DIRECT INTERROGATORY No. 3:

I have never specialized in psychiatry, however, I had some training in it and was psychiatrist for the Selective Service Board here in Chicago before I went on active duty.

DIRECT INTERROGATORY NO. 4:

Were you a Captain in the Medical Corps and surgeon in the 602nd Tank Destroyer Battalion and as such stationed in Germany in the spring of 1945?

ANSWER TO DIRECT INTERROGATORY NO. 4:

Yes.

DIRECT INTERROGATORY NO. 5:

Please state whether or not you remember a soldier named Marton L. Whelchel, Army Serial No. 18038433, Company C, 602nd Tank Destroyer Battalion.

ANSWER TO DIRECT INTERROGATORY NO. 5:

Yes.

DIRECT INTERROGATORY NO. 6:

If in answer to the foregoing interrogatory you state that
31 you knew Whelchel, please state whether or not you remember on or about April 23, 1945, making a psychiatric examination of said Marton L. Whelchel.

ANSWER TO DIREGT INTERROGATORY NO. 6.

I did not make a psychiatric examination of Marton; I did make a physical examination of the type the Army calls a shortarm examination; I examined his privates, for evidence of abuse. I asked him a few questions, but his answers were vague and he was negativistic.

DIRECT INTERROGATORY NO. 7:

If you answered the foregoing interrogatory, yes, please look over the attached copy of the report signed by you and state whether or not you remember making such examination and such report on and of Marton L. Whelchel."—This is the attached report.

The COURT: What is the substance of the report? You can offer the whole thing in evidence, but what is the substance of it?

Mr. CARNEY: Well, I will just read the last two paragraphs.

(REPORTER'S NOTE: While the last two paragraphs only were read into the record at this point, the entire statement is hereinafter copied for the information of the Court.)

32 "Medical Detachment

602nd Tank Destroyer Bn.,

APO #403, U. S. Army

23 April 1945.

201-Whelchel, Marton L. 18038433, Pvt. 602nd T D Bn.

Subject: Information in regards to the reopening of the case of Private Marton L. Whelchel 18038433, Co. C, 602nd T D Bn.

To: Commanding General, 89th Infantry Division APO #89, U. S. Army.

Private Marton L. Whelchel's entire behavior on the night of the 14th of March, 1945 was that of an insane or drunken individual, surely not that of a sane or sober man. His complete amnesia of the night causes me to think he either was so drunk he did not know what he was doing or that he had an epileptic episode. True enough his past history in this battalion does not bring out any previous episode but this could very well have been his first one.

My observations of the man after he committed this crime revealed that he never spoke of it and went about unconcerned and firmly convinced of his own innocence. Attempts by fellow soldiers and guards to make him talk about his exploits always brought out a negative answer. I am convinced that his negative answers and self assurance that he was not in serious trouble were the result of his amnesia of the whole incident.

33 Questioning his officers I was told that he recently had become a very troublesome individual in the company. In one incident he fired a fifty caliber machine gun in a rear area installation and when asked why he did it, he said he did not know. At another time he went to his platoon Commander and asked to be reduced from grade Technician 4th Grade to Private. When asked why he said he felt he could not hold the rating because he was not sure of himself.

Putting these factors together plus the unbelievable evidence that he was sober cause me to conclude that the boy is not normal mentally and as such should be given the proper consideration.

(S.) NINO M. PELLETTIERI,
(T.) NINO M. PELLETTIERI,
Capt. Medical Corps, Surgeon, 602nd T D Bn.

A true copy:
(Signed) FRANK LATNIK,
WOJG, USA."

Mr. CARNEY: Now, that was made April 23, 1945 and that is the statement that was attached.

The COURT: That was after the trial?

Mr. CARNEY: After the trial and was attached by Madison
34 to his application for a re-examination.

The COURT: All right.

"Direct Interrogatory No. 8:

Doctor, do you have a present recollection now of the said Marton L. Whelchel and a recollection of his being charged before a court-martial with rape and of his conviction and sentence to death?

Answer to Direct Interrogatory No. 8:

Yes.

Direct Interrogatory No. 9:

If you answered the foregoing interrogatory, yes, please state your opinion based upon your observation of the said Marton L. Whelchel, your recollection of the facts to that time regarding the alleged offense, the conduct of the said Marton L. Whelchel just before and at the time immediately following the same, as to whether or not the said Marton L. Whelchel was mentally responsible for his acts at the time of the alleged occurrence of the rape and at the time of his trial before court-martial.

Answer to Direct Interrogatory No. 9:

In my opinion Marton Whelchel was not mentally responsible for his acts at the time of the alleged occurrence of the rape or at the time of his trial before court-martial.

Direct Interrogatory No. 10:

Assuming, Doctor, that you knew about the accusation
35 against Marton L. Whelchel, charging him with rape of a German girl on or about March 14, 1945, and assuming that thereafter he was tried by court-martial and convicted and given the death penalty, and further assuming that during said trial he was listless about the entire matter and denied any knowledge thereof and refused to cooperate with his counsel in his defense, causing his counsel to ask for a mental examination of the said Marton L. Whelchel by you, and from which you found and made a report in writing that in your opinion the said Marton L. Whelchel was suffering from total amnesia of the whole rape incident and knew nothing about it; then, in your opinion, state whether or not the said Marton L. Whelchel was mentally incapacitated to such extent that if he committed the act, he was not mentally responsible therefor.

Answer to Direct Interrogatory No. 10:

Assuming as true the facts stated in Direct Interrogatory No. 10, then, in my opinion the said Marton L. Whelchel was mentally incapacitated to such extent that if he committed the act he was not mentally responsible therefor.

Direct Interrogatory No. 11.

Assuming all the facts set forth in the foregoing interrogatory, state whether or not it is your opinion that at the time of the trial of the said Marton L. Whelchel, his mental condition was such
36 as to preclude him making a valid defense and assisting his counsel therein.

Answer to Direct Interrogatory No. 11:

In my opinion at the time of the trial Whelchel did not remember the incident in question and had a complete blackout with reference thereto.

Direct Interrogatory No. 12:

From your experience in the army, Doctor, please state if from that experience you saw and examined many soldiers who lost their mental faculties by reason of what is commonly known as a 'crack-up' from long continued duty in the campaigns against the enemy, rendering such soldiers mentally irresponsible for their acts.

Answer to Direct Interrogatory No. 12:

Yes. I examined and witnessed many such cases.

Direct Interrogatory No. 13:

If you have answered the foregoing interrogatory in the affirmative, please answer the following question: Assuming that at the time it is alleged Marton L. Whelchel raped the German woman, he had been in the army continuously in combat for a long time, more than three months, and that up until about two weeks before the alleged occurrence of rape had been a model soldier but about two weeks before the alleged rape occurrence he had seemed to crack-up and had fired the guns of his tank destroyer over the heads of his men
37 and had, shortly before the occurrence of the firing of the guns, gone to his Commanding Officer and told him he wanted to be demoted from Sergeant, appearing to the officer to be mentally unstable at the time, and appearing to Sergeant Goolsby to have cracked up mentally, and assuming further that on your examination of him shortly after his trial, it appeared he was suffering from total amnesia of the whole occurrence of rape, would or not it be

your opinion that the said amnesia was caused by this crack-up from combat fatigue?

Answer to Direct Interrogatory No. 13:

Yes. The battle fatigue was the trigger or the fuse that set off the crackup.

Direct Interrogatory No. 14:

Doctor, if there is anything in this case that you think of importance to relate that we have not asked you about, will you please so state it in answer to this interrogatory?

Answer to Direct Interrogatory No. 14:

Whelchel was a member of C Company, one of the gun companies of the 602nd Tank Destroyer Battalion. It saw considerable heavy action continuously from November 1944 on through March 14, 1945.

It served with a Ranger Battalion forming a task force ahead
38 of the main army forces in that sector from the time of the pushoff from Nancy to the Saar belt. From there it was transferred to the Second Cavalry to serve on reconnaisance mission through the entire Battle of the Bulge. Shortly before this incident C Company was returned to the battalion and continued fighting with the battalion. Therefore the men in the company were pretty much on edge all the way through.

(S.) NINO M. PELLETTIERI.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me, a Notary Public, in and for Cook County, Illinois, by Dr. Nino M. Pellettieri, on this 12th day of February, 1949.

(S.) ELLEN CARROLL,
Notary Public.

My Commission Expires December 19, 1950.
[SEAL]

Mr. CARNEY: Now, Your Honor, we want to specifically introduce these statements in the record. We won't read them to you

The COURT: That is the statements of Captain Madison,
39 Sgt. Goolsby and Captain Graham, or are you going——

Mr. CARNEY: That is correct.

The COURT: Are you going to use Captain Graham?

Mr. CARNEY: I am going to use him, but this was made then and I want to introduce it.

The COURT: All right.

Mr. CARNEY: Captain Matisin's statement is on page 134 of the record and we introduce it in evidence.

The COURT: What is the substance of that statement?

Mr. CARNEY: The substance of that statement is——

The COURT: What is the date of it?

Mr. CARNEY: Dated April 25, 1945.

The COURT: All right.

(Reporter's Note: Reporter has been writing the name of Captain Madison heretofore when it should have been Captain Matisin, according to the Court-Martial record, which discrepancy Reporter has just discovered)

STATEMENT OF CAPTAIN MATISIN

"APO 89 U. S. Army

25 April 1945.

Subject: Neuropsychiatric Examination of Private Marton L. Whelchel, ASN 18038433, Company C, 602 TD Bn.

To: Commanding General, 89th Infantry Division, APO 89 U. S. Army.

40 1. On 10 Apr 45, Pvt Marton L. Whelchel, 18038433, Co. C. 602 TD Bn, was brought before a GCM, tried, and convicted of a violation of the 92d AW (Rape). Pvt Whelchel was sentenced to be hanged by the neck until dead.

2. After announcement of the sentence, it was brought to the attention of the Defense Counsel by Captain Nino M. Pellettieri, MC. Surgeon, 602 TD Bn, who has had frequent contacts with Pvt Whelchel that he may be a victim of Epilepsy and that the crime may well have been committed during an epileptic episode, a situation which would, of course, render him irresponsible for his actions.

3. During my interview with the accused prior to the trial he appeared reticent and unconcerned about the entire situation. He told me there was nothing to add to his statement made at the investigation. I was unable to obtain any informaton of material consequence in my interviews with members of his company—no mention was made of his sanity. I was, in consequence, unable to introduce the issue during the trial. He was apparently not affected by his sentence.

4. In view of the above facts it is requested that the case be reopened and that Pvt Whelchel be admitted to a hospital for a thorough neuro-psychiatric examination.

5. Delay in submitting this request was occasioned by efforts of the undersigned to obtain additional information from the Medical Officer concerned. Statements of Capt. Pellettieri, Lt. Graham
41 and Sgt Goolsby are attached as inclosures.

(S.) JOSEPH J. MATISIN,
(T.) JOSEPH J. MATISIN,
Capt. 335th Inf.,
Defense Counsel.

3 incls:

1—Statement of Nino M. Pellettieri, Capt. MC.

1—Statement of Robert E. Graham, 1st Lt. 602d TD Bn.

1—Statement of Harry P. Goolsby, Sgt. Co. C, 602d TD Bn.

STATEMENT OF SGT. HARRY P. GOOLSBY

Mr. CARNEY: The application was evidently presented to these members of the Court. "The undersigned members of the General Courts Martial appointed by Paragraph 1, SO Hq 89th Inf. Div., dated March 45, by whom Pvt Whelchel was tried, concur in the request of the Defense Counsel." And it is signed by five members of the six member court. That appears on page 135 of the record. Now, Your Honor, I want to introduce the statement by Sgt. Harry Goolsby referred to in that application. It appears on page 133 of the record. This statement was made by Goolsby on April 24, 1945, and was addressed to the Commanding officer, 89th Infantry Division. "Private Whelchel was the driver of the Tank Destroyer
42 which I command. According to my own personal observation Private Whelchel was a perfect soldier up to about the 21st February, 1945. On this date Private Whelchel after having a small amount to drink got very quarrelsome with the men who had always been his best friends. He fired a fifty caliber machine gun over the head of his assistant driver. After this incident Private Whelchel seemed to lose control of himself and appeared to crack up mentally.

(S.) SGT HARRY P. GOOLSBY,
(T.) SGT HARRY P. GOOLSBY,
ASN 6262432,
Co. C, 602nd T D Bn.

Mr. CARNEY: Now, I will call Captain Graham.

CAPTAIN ROBERT GRAHAM, called as a witness by Petitioner, first having been duly sworn, testified as follows:

Direct examination.

By Mr. CARNEY:

Q. Your full name is Robert Graham, Captain Robert Graham. Where do you live?

A. In Galena Park, Texas.

Q. Were you in the army with Pvt. Whelchel?

43 A. Yes sir.

Q. What position did you occupy in the outfit that he was with?

A. Platoon leader. First Lieutenant, platoon leader.

Q. You were First Lieutenant and platoon leader?

A. Yes sir.

The COURT: Are you in the army now?

A. No sir.

The COURT: Where is your home?

A. Galena Park.

Q. Close to Houston.

A. It is in Texas, close to Houston.

Q. It is really surrounded by Houston now. I believe they incorporated all around you.

A. Yes sir.

Q. Captain Graham, first we will get your background. When did you first get in the army?

A. In January 1941.

Q. Were you an enlisted man?

A. Yes sir.

Q. You went in as an enlisted man, a private?

A. Yes sir.

Q. To start with. In 1941. Where did you live at that time?

A. In Galena Park.

Q. You lived at the same place. Your people lived there?

A. Yes sir.

44 Q. Did you have any brothers who went to the army?

A. Three of them.

Q. You had three brothers?

A. Yes sir.

Q. And where were you sent from there?

A. From——

Q. From your point of where you were taken in.

A. Brownwood.
Q. Sent to Brownwood?
A. Yes sir, 36th Division.
Q. How long did you stay there, do you remember?
A. Almost a year.
Q. Well, did you take the officer's training course any where?
A. In Camp Hood, Texas.
Q. Did you pass it, were you commissioned as an officer?
A. Yes sir.
Q. As a result of that. What was your commission?
A. Second Lieutenant.
Q. Then, afterwards were you promoted to First Lieutenant?
A. Yes sir.
Q. When did you go overseas?
A. In 1944, in about September.
Q. September of '44?
A. Yes sir.

Q. Well, how long after you got overseas before you went
45 into action?

A. I would say about two or three weeks.
Q. What army were you in?
A. That is, up until we got in France. We were in England and then went over to France in about September.
Q. What army were you in?
A. Patton's army, the 3rd Army.
Q. The 3rd Army?
A. Yes sir.
Q. What kind of a fighting outfit were you with, what were you called?
A. Tank destroyers.
Q. Tank destroyers.
A. Yes sir.
Q. That is some kind of a vehicle that is propelled——
A. It is similar to a tank, only the top is open. We had a 3 inch long rifle for, you know, made to knock out tanks, enemy tanks.
Q. How many did you have in a platoon, in your platoon?
A. We had four tank destroyers, two armored cars and two or three jeeps.
Q. All right. When you first went in there was Pvt. Welchel a member of that platoon?
A. Yes sir.

Q. This is the same Whelchel that is sitting here?
46 A. Yes sir.

Q. And he served under you then from then until the time of his trial?
A. Yes sir.

Q. What kind of a soldier was he?
A. He was a good soldier.
Q. Did you have occasion to know him intimately and his actions under fire?
A. Yes sir, I did.
Q. And every way?
A. Yes sir.
Q. Well, now, Captain, did anything happen to him prior to the time he was tried for this rape? Anything brought to your attention especially about him?
A. Well, about two weeks before the trial we were stationed—we had been leading a combat team with our platoon and we were put in a reserve position for the night in Germany. I believe it was Neurberg. When I first noticed anything he came to me and asked to be—just walked in to the room where I was there and appeared to be intoxicated, and asked to be reduced, and I thought maybe he was tired, and maybe had a drink, and I told him to go to bed.
Q. Was he a sergeant at that time, Technical Sergeant?
A. He was a T-5.
A. T-5?
47 A. Yes sir.
Q. What position did he hold by reason of being a sergeant in that tank destroyer?
A. He was the driver.
Q. How many more men in that tank destroyer with him?
A. Four.
Q. Was Sgt. Goolsby one of them?
A. Yes sir.
Q. Had he been with him a long time?
A. Longer than I had. They had been in the 2nd Division.
Q. You didn't pass on that right now?
A. No sir.

The COURT: You say he was drunk at the time or intoxicated?
A. He appeared to be, yes sir.
The COURT: All right.

Q. Up to that time had you ever noticed him to be a drinking man?
A. Well, not very much; he had, you know——

The COURT: Yes, I know soldiers will take a drink occasionally. I have personally observed that.

Q. But he had never been drunk before that you know of?
A. No sir, not that I know of.
Q. So then what happened to him about that time?
A. Well, I took him,—I sent him to his room, but he didn't stay

there, and he picked fights with two or three of his friends,
48 and fought boys he had lived with and been with for years.

Then we tried to calm him down, you know; in a combat situation like that you just can't call the MPs or somebody, you know, and so after he did that, then we thought he had calmed down and the next thing I knew I heard the machine gun firing, and I went outside and one of the boys was pulling him out of there; he had fired over his head. So I put him in one of the jeeps and took him to the company commander. It was about two miles or three miles away, and I asked him then if he—I told him that I thought we ought to take him to the Medics or some place, because—well, what I told him, I told him I thought he was crazy instead of being drunk.

Q. You attributed his actions then to something other than just being a little drunk?

A. Yes sir, I did.

Q. He was so different in his way and so forth?

A. Yes sir.

Q. Did you talk to him about that incident afterwards, in two or three days, about the firing of the gun?

A. Yes sir. The next day or so. Of course, he was—the Captain kept him there and reduced him to a private and put him in another platoon, and I saw him in the next day or so and questioned him.

Q. Did he know anything about that incident?

49 A. He said he didn't remember anything about it.

Q. Were you satisfied at the time he was telling you the truth about it, that he didn't actually remember?

A. Yes sir.

Q. Now, Captain, at that time you say that you noticed something wrong with him. Did you have anything done about it in any way? You didn't have him examined or anything at that time?

A. No sir. No sir, we didn't.

Q. That was about two weeks before this alleged occasion of the rape of the German girl?

A. Yes sir. He went into the other platoon.

The COURT: Are you a drinking man?

A. Sir?

The COURT: Are you a drinking man?

A. Yes sir.

The COURT: Were you ever drunk enough not to know what happened the night before?

A. No sir, I haven't been.

The COURT: Well, you haven't drunk much then, I am afraid, but go ahead.

Q. You say in your opinion there was something other than the drinking the matter with that boy at that time?

A. Yes sir.

50 The COURT: Are you familiar with the fact that there is a thing known as toxic amnesia resulting from excessive use of alcohol?

A. I am not too familiar with that.

The COURT: Well, there is such a condition. It is well recognized by the medical authorities. But go ahead, Judge Carney.

Q. Well, after that now, about two weeks after that this alleged rape occurred. Do you remember about that incident?

A. Yes sir.

Q. Were you present at his trial before the court-martial?

A. Yes sir.

Q. Did you notice his demeanor and his actions with his counsel at that time?

A. Yes sir. He didn't appear to be concerned at all with the trial, or even after the sentence was passed.

Q. Now, he wasn't drinking then, was he?

A. No sir.

Q. He had been in the guardhouse two weeks. He hadn't had an opportunity to be drinking, had he?

A. No sir.

Q. You say at that time he appeared to you in that condition. Well, from what you saw of him there and his actions, will you tell the Court whether or not at the time of his trial that man was mentally responsible in your opinion?

Mr. KING: We object to that, Your Honor. I don't think
51 the witness is qualified.

The COURT: I will sustain the objection to it. You can testify if you noticed any abnormalities in his behavior or conduct or any manifestation he made himself, anything that was unusual about his behavior, his appearance or anything of that kind. Just what you saw. I don't think you are qualified to express an expert opinion unless you give a whole lot of facts upon which it is based. But did you notice anything unusual about his conduct or appearance during the trial?

A. Yes sir. Well, what I noticed particularly was when he was sentenced. I mean, I know when they say sentenced to be hung by the neck until dead, I know it would make me a little nervous, and you know, at least, and it didn't—just like——

Q. Didn't faze him?

A. Didn't faze him at all.

The COURT: He didn't display any emotion about it?

A. No sir, he didn't.

Q. Did he seem to realize the import of what that sentence was?

A. No sir, he didn't.

Q. Under those facts we ask again the question——

Mr. KING: Your Honor, I think that is objectionable.

The COURT: Well, I think it is.

Mr. KING: We are trying it before the Court.

52 The COURT: Well, did you notice anything else unusual about him there during that trial?

A. No sir.

The COURT: I don't think he is qualified to express an opinion.

Q. For the purpose of the record we will ask that he give his answer.

The COURT: All right.

Q. From what you did observe and from what you saw and from what you have related to the Court, from that, and from your former knowledge of Whelchel and his demeanor and actions and conduct which you say you had known intimately for some three months, will you tell the Court whether or not in your opinion he was mentally responsible at the time of the trial?

Mr. KING: We object, Your Honor.

The COURT: I will let him go ahead and answer since this is before the Court. I think it is objectionable, but go ahead.

Mr. KING: Yes, I understand.

A. No sir, I don't think he was mentally responsible.

The COURT: Did you make any representation to this court to that effect?

A. Not at the court, no sir.

The COURT: Why didn't you?

A. Because it hadn't occurred to me until after the time

53 of the trial.

The COURT: You knew the court would pay attention to any representation of that kind you made, didn't you? I am talking about as an officer in the army. If you had that belief or that impression why you didn't make some representation to this court to that effect, especially when this man was a member of your command.

A. Sir, I was a character witness at the trial and—I mean in fact, I wasn't any——

The COURT: I am not asking you what kind of a witness you were. I say if you had that impression at that time, why didn't you under

your responsibility to that man as an officer make that representation to the members of the court?

A. Sir, we made this deposition immediately after the trial was all we could——

The COURT: I am asking you why you didn't make that representation to the court when you were there before it. If you had that impression and didn't do it you have got a darn poor conception of your responsibility as an officer.

Mr. CARNEY: We object to that statement by the Court and say it is not fair to the witness.

The COURT: Well, will you tell me why you didn't make that statement if you had that impression, representation if you had that impression?

A. Sir, I got the impression—I was telling about—was when
54 he was sentenced and I didn't have—I couldn't make any statement to the court at that time. That was as he was sentenced there, when he was sentenced, when they passed the sentence on him.

The COURT: You mean that you couldn't have talked to the court personally and made that representation in writing to them?

A. We did after the trial, sir

The COURT: Well, all right.

Mr. CARNEY:

Q. Immediately after the trial you did that, didn't you?

A. Yes sir.

Q. I believe that was dated the 24th, your statement—No, the 25th.

The COURT: What was his statement at that time? Do you have a copy of it there?

Mr. CARNEY: How is that?

The COURT: Do you have a copy of his statement?

Mr. CARNEY: Yes sir.

The COURT: What does he say in there?

Mr. CARNEY: "In my own personal opinion Private Morton L. Whelchel was mentally unstable. For instance, on or about the 21st of February, 1945, my platoon was in a reserve position near Neurburg, Germany. Private Whelchel who was an occasional drinker,
but had never caused any trouble, came to me apparently
55 intoxicated and asked to be reduced from the Tec 4th Grade rating he then held to Private. I sent him out and told him to go to bed and think it over. He went out and instead of going to bed proceeded to pick fights with two or three of his best friends. Later on he went out to one of the Tank Destroyers and fired the 50 caliber machine gun over one of the men's head. I then took him

to the Company C. P. where he quieted down. The next day he was reduced and sent to the 1st Platoon. When questioned about the incident of the day before he had no knowledge of it."

The Court: You testified as a character witness at the trial and you didn't volunteer any of this information that you detailed in that letter to the court at the time you appeared as a witness.

A. No sir.

The Court: All right.

Mr. Carney:

Q. Now, then, you say the trial was over when you had finally concluded in your mind that he was mentally unstable, that is, as he was being sentenced then was your final impression that man was not mentally stable?

A. Yes sir.

Q. And, of course, at that time you had no opportunity to tell the court anything about it, but you did tell his attorney just as soon as you possibly could and you gave him a statement and that statement went into the record.

56 The Court: All right.

Q. Now, Captain, you say that prior to the time of this first incident this man had been a soldier under you.

A. Yes sir.

Q. Had you ever noticed anything up to that incident that made you a little leery about his mental condition? Up to the time of that? Had you ever noticed that before that time?

A. No sir, not particularly.

Q. That was the first time?

A. Yes sir.

The Court: All right. Is that all?

Mr. Carney: That is all, yes.

The Court: Any questions?

Mr. Carney: Just a moment, Your Honor.

Q. By the way, did you know Captain Matisin the man that represented him?

A. I met him while he was—I met him once before the trial and then at the trial, yes sir.

Q. Do you know whether or not he was an attorney at law?

A. Whether he was a lawyer?

Col Voorhis: Your Honor, there is no issue in this case about that.

Mr. Carney: That is your position about.

THE COURT: It doesn't make any difference whether he was or whether he wasn't. If he knows, he can state it.

A. No sir, I don't know.

57 Mr. CARNEY: You don't know.

The COURT: All right.

Mr. CARNEY: I want it in the record that the attorney for the Judge Advocate General's Department says he doesn't know.

The COURT: All right.

Mr. KING: It is not required.

The COURT: I understand. It doesn't make any difference one way or the other.

Mr. CARNEY: My idea, Your Honor, is that they ought to be willing to present all the facts here that we don't know and can't find out.

The COURT: I think they are willing to do that.

Mr. CARNEY: He ought to know whether he was a lawyer.

The COURT: I don't know how he would know if this man who served with him didn't know.

The WITNESS: I didn't serve with him.

The COURT: Whether he was a lawyer or not a lawyer doesn't make any difference.

Mr. CARNEY: We disagree with Your Honor. We say that if this man had been a lawyer he probably would have brought this matter up before he did. But being an officer without any legal training this man wasn't half tried, wasn't half defended. You can read that record and see that.

The COURT: Well, they can't go out and get lawyers to represent these men in times of war, and that is not required and it

58 doesn't make any difference one way or the other whether the officer appointed to represent him was a lawyer or not. But that is all on direct examination of this witness?

Mr. CARNEY: That is all.

CROSS-EXAMINATION.

By Col. VOORHIS:

Q. Captain Graham, in the letter you wrote the Commanding General of the 89th Division, was that written at the request of the defense counsel?

A. No sir.

Q. It was included——

A. Doctor—Pardon me.

Q. It was included as an exhibit or inclosure to his letter, was it not?

A. Yes sir.

Q. How did you come to write it?

A. Dr. Pellettieri, and I—at the time of the trial—in other words, at the time of the trial I was still in combat. You know, the war wasn't over yet. And we were still pushing on forward to Czechoslovakia there, and so we were about 300 or 400 miles from the place where they had the trial, which was in Germany. So going back from the trial Dr. Pellettieri and I were talking about it.

The COURT: Did Dr. Pellettieri appear as a witness in the trial?
59 A. Yes sir.
The COURT: And testified before this general court-martial?
A. Yes sir.
The COURT: All right.

Q. Now, Captain Graham, in your letter did you say anything about your reaction to his conduct during the trial, or at any time before sentence was pronounced?
A. No sir. I didn't.
Q. Who was the accusor in this case?
A. In this case?
Q. Yes, who brought the charges against Whelchel?
A. It fell my duty to investigate the case.

The COURT: He asked you who brought the charges against Whelchel, Captain Graham.
Mr. CARNEY: The record speaks for that.
The COURT: Well, he can answer that question, if he knows. Can you answer that?
A. No sir, I can't.
Mr. CARNEY: The record shows who that was.

Q. Is that your signature?
A. Yes sir.
Q. Now, I will ask you to look at these original charge sheets and ask you who the accusor of Whelchel was.

The COURT: What is your answer, Captain?

A. I signed these charge sheets, yes sir.

60 The COURT: And you swore to them, did you not?
A. Yes sir.
THE COURT: Well, that is enough, Colonel.

Q. The page reference in Respondent's Exhibit 1 to the charge sheet is page 26 through page 29. The signature of Robert E. Graham as accusor appears on page 28 as does his oath.
The COURT: All right.
Q. No further questions.

RE-DIRECT EXAMINATION.

By Mr. CARNEY:

Q. Captain Graham, you say that it became your duty to do that?
A. Yes sir.
Q. Is that the duty under military law of the commander to file charges where complaints are made to him?
A. Sir, at that time I was the only officer in the company present. This German man made the complaint to the Captain. He had to leave on a tactical mission and left me to bring up the company, and he told me to investigate, and with the battalion commander who came down there we investigated this that morning and then I moved on out, left Whelchel with the reconnaissance company.
Q. Ordinarily it would have been the Captain's duty. You were the lieutenant.
A. They usually appoint an investigating body.
61 Q. But you were told by your Captain to make the investigation and to file the charges?
A. Yes sir, I was.
Q. That is all.

RE-CROSS EXAMINATION.

By Col. VOORHIS:

Q. You made an investigation?
A. Yes sir.
Q. And at the end——
A. That investigation that morning, yes sir.
Q. And at the end of the investigation you preferred charges?
A. Yes sir, I signed that.
Q. And swore to them?
A. I signed that charge sheet.

The COURT: Are you gentlemen through with the Captain?
Mr. CARNEY: Yes sir.
The COURT: Are you through with him?
Mr. KING: Yes.

CARL M. BRADLEY, called as a witness by the Petitioner, first having been duly sworn, testified as follows:

62 DIRECT EXAMINATION.

By Mr. CARNEY:

Q. Is your name Carl Bradley?
A. That is right.

Q. Where do you live, Carl?
A. Six miles north of Queen City.
Q. How old are you?
A. 57.
Q. How long have you lived there?
A. Well, I have lived there all my life.

The COURT: Carl Bradley is your name?
A. Yes sir.
The COURT: I didn't get it clear.

Q. Do you know this boy here Marton L. Whelchel?
A. Yes sir.
Q. How long have you known him?
A. All his life, I guess; every since he was any size.
Q. How far have you lived from him?
A. About three quarters of a mile.
Q. Did you know his father?
A. From 1911 to 1926.
Q. Did you know his grandfather?
A. Yes sir.
Q. Have there been any evidences of insanity in the father and grandfather that you noticed?
63 A. Yes sir.
Q. Before his death, the grandfather, about how many years was he considered by the community there as being insane?

Col. VOORHIS: Your Honor please, is that a reasonable question?
The COURT: I don't think it is material, but I will let him answer.
A. Something like three years.
The COURT: How old was he?
A. His grandfather?
The COURT: Yes.
A. He was around 80 when he died.
The COURT: All right.

Q. Now, then, the boy's father,—what was his first name?
A. Luther.
Q. Did you know him intimately?
A. Yes sir.
Q. Have many personal and business transactions with him?
A. Quite a few.
Q. Did you ever notice anything out of the usual in his conduct in that community which might indicate a disordered mind?

Mr. KING: We object to that.
The COURT: I don't think it is material at all, but I am going to let him answer; get everything he can in the record he wants. Go ahead.

A. Well, when I first knew him, the first years I knew Mr.
64 Whelchel he was a very quiet man; didn't have anything to say much. The last 18 months or two years of his life he was more or less irritable and seemed to be hard to get along with; harder to get along with than he had been.

The COURT: Was there any complaint of lunacy filed against him to your knowledge?

A. No sir.

The COURT: Was he ever committed to an institution?

A. No sir.

The COURT: Was he ever restrained in any way?

A. Well, not that I know of.

Q. Well, did you ever know any incident where he attacked people and had big fights with them?

Mr. KING: We object—well——

A. Yes, I have.

Q. After that did you talk to him about the matter?

A. Yes sir.

Q. Did he appear to have any knowledge of what went on during those fights?

A. He told me he did not.

Q. He told you he did not.

The COURT: Was he a drinking man?

A. Sometimes he drank.

Q. Well, these incidents you are talking about, did he attribute them to drink in any wise? Did anybody ever attribute
65 them to drinking?

A. Not that I know of.

Q. Now, then, Mr. Whelchel——

The COURT: Bradley.

Q. How often did he have these spells when he would be on these rampages, get in fights and get in difficulties with his neighbors and would never know about it? How many of them did you ever know about?

A. A couple of times that I remember.

Q. Well, then, at the time of his death, just before he died what happened then?

A. You mean in the last—the case with the woman?

A. Yes.

Q. Well, you know, his mother was sick. Luther's mother was sick for quite a bit there, and Mrs. Barnwell came there to see his

mother and he met her. He came down to his mother's house and give her a cursing, I understand, and told her to leave and not come back.

Q. Did he after that time state to you that he didn't remember anything about that procedure and go over and apologize to the Barnwells for that?

A. Yes, he did.

Q. Taking all those things into consideration, Carl, will you tell the court whether or not in your opinion that man had insane periods in his life in which he wouldn't know what he was
66 doing?

Mr. KING: We object to that.

Q. And was very violent?

The COURT: I will let him answer. Go ahead.

A. Judging from his own words and from his own action he didn't know, and the doctor that attended him——

Mr. KING: Just a minute.
The COURT: That is objectionable.
Mr. CARNEY: We want to prove one statement by the doctor.
The COURT: Bring the doctor here.
Mr. CARNEY: What doctor was that?

A. Dr. Kidwell.
Q. He has been dead for many years. What year was that?
A. In 1926.
Q. Did Dr. Kidwell come to wait on him?
A. Yes sir.
Q. Mr. Whelchel killed himself by taking poison, didn't he?
A. That is what the doctor told me.
Q. Did the doctor make any remark to you about that at that time.

Mr. KING: We object to it.
The COURT: I will let him answer.

A. I asked the doctor what he thought of his condition; he says, The man is going to die", and he says, "It is better that he die than to get well." He says, "If he was to get well," he said, "He is crazy and he would kill some one else."
67 Q. Said he was crazy and would kill somebody?
A. Yes sir.
Q. That is all.

The COURT: You don't have any questions, do you?
Mr. KING: No.
The COURT: Stand aside.

The COURT: Are you willing to let the record show that T. J. Barnwell would testify to similar effect as the previous witness?

Mr. CARNEY: We are.

The COURT: Is that satisfactory to you, Colonel?

Mr. KING: Pardon me. I didn't hear what you said.

The COURT: Judge Carney said this is similar testimony to that of Mr. Bradley. Are you all willing to admit that if he testified, he would testify to the same effect as the previous witness?

Col. VOORHIS: As to the father and grandfather?

Mr. CARNEY: Yes.

The COURT: All right. Let the record show that.

Mr. CARNEY: I want to introduce and call to the Court's attention especially part of that record, two sentences out of the examination, psychiatric examination of Marton L. Whelchel made by Nathan P. Segel, Captain Medical Corps, Division neuropsychiatrist, before he was tried.

68 The COURT: All right.

Mr. CARNEY: On page 75 and 76 of the record and in the report it says here under heading of Orientation: "Mental grasp, and capacity: He is oriented for time, place, and person and both remote and recent memory are adequate. His school and general knowledge was poor. On the Wechsler-Bellevau intelligence test he scored a mental age of 11 years and five months and an IQ of 71."—On page 76 of the record and part of the same examination and report Captain Segel under summary and conclusions, he says—this sentence we introduce: "Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information."

The COURT: Well, the whole report is in the record.

Mr. CARNEY: Yes, sir, in the record. I just read that, call that to your attention.

MARTON L. WHELCHEL, Petitioner, first having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. CARNEY:

Q. Is your name Marton L. Whelchel?

A. Yes sir.

69 Q. Marton, where did you live before going into the army?

A. I lived out of Queen City in Cass County.

Q. When were you inducted in the army, Marton?

A. In January of '41.

Q. In January of '41, and after you were inducted in the army where did you serve?

A. Well, I served at Dodd Field, Texas, Fort Sam Houston, Texas; Brownwood, Texas; Camp Hood, Texas; Camp McCoy, Wisconsin; Camp Forrest, Tennessee; Camp Kilmer, New Jersey; Fort Dix, New Jersey.

Q. From there where did you go?

A. Went to England.

Q. How long did you s-ay in England?

A. I am not certain. Somewhere around a month.

Q. From England where did you go?

A. We went to France.

Q. In whose army were you placed; what army was that?

A. General George S. Patton.

Q. How long after you reached that army before you got in battle?

A. Well, sir, I wouldn't say for sure, but a couple or three weeks. Something like that.

Q. And Marton, the record shows that you were accused of rape on a German woman, alleged to have occurred in March, 1945. Now, from the time that you first had combat service in Patton's army were you continuously up until that time in combat?

70 A. Yes sir. I was never out of the combat zone.

Q. How many battle stars did you have?

A. Well, sir, I don't know. I never got any record of my service or anything. It don't state on the record of my trial or anything, but I think I participated in either four or five major battles.

Q. You think you are entitled to either four or five battle stars.

A. Yes sir.

Q. You, of course, haven't got any record of them.

A. No sir.

Q. You heard Captain Graham's testimony that about two weeks before, it is charged you raped this German woman, something seemed to happen to you and that you shot the guns of the machine one night. Do you remember that incident, Marton?

A. No sir. I remember what the men in the company told me. They told me over and over several times, reminding me of the incident.

Q. You have now no present recollection of having shot those guns?

A. No sir.

Q. But you do remember you were told by the boys that you did do that?

A. Yes sir.

71 Q. Up to that time, Marton, had you ever had any mental trouble in any way up to that time?

A. No sir, not that I know of.

Q. Had you faithfully carried out your duties as you could as a soldier?

A. Yes sir.

Q. You were a Technical Sergeant, I believe, at that time?

A. Yes sir.

Q. Now, do you remember the incident of going to Captain Graham and asking to be demoted from sergeant?

A. No sir.

Q. You don't remember anything about that. Have you heard about that since?

A. Yes sir. I have heard of it. I have a statement of that showing that right in my possession.

Q. Since you have been in prison you have been furnished with a copy of the record and you have seen those things in the record?

A. Yes sir.

Q. Marton, you were charged with going into a house with a soldier named Spohn and raping two German girls. Do you have any recollection of doing that?

A. No sir.

Q. Have you ever had any recollection of having done that?

A. No sir.

72 Q. The record shows you were tried by court-martial about April 10. Have you a present recollection of your trial, who was your lawyer?

A. Well, sir, the only thing I have a record of my trial. That is all I have got to go by.

Q. You have read the record of the trial?

A. I have a record of my trial in my possession.

Q. Independent of that record, have you got any personal recollection now about that trial, what happened?

A. No sir. Only what I have read from the record is the only recollection I have about it.

Q. Now, Marton, there has been some talking here about this incident of shooting off the guns, that you were just drunk at that time. Do you ever remember being drunk about that time?

A. No sir. I never practiced drinking to- awfully much. I drank occasionally but conservative. I never went——

The COURT: Hadn't you been previously convicted by court-martial for drunkenness prior to this transaction?

A. Well, sir, I was convicted by summary court-martial for being AWOL.

The COURT: And drunkenness?

A. And drinking and resisting arrest, I believe it was, in a public place.

Q. That was how long before this?

73 A. It was on my first enlistment in the army.

Q. On your first enlistment?

A. Yes sir. When my enlistment run out they didn't call me in the orderly room or anything to review it or anything.

Q. You don't remember what date that was, that summary court-martial?

A. No sir.

Q. Has Your Honor got the date there any where?

The COURT: I just saw the record. I don't have the date before me. But go ahead with your examination. I don't know what the date was.

Q. I see it in Segel's statement here. It was in 1943. Was this the only incident you ever had while in the army?

A. Yes sir.

Q. The only court-martial you ever had?

A. Yes sir.

Q. How much punishment were you given for that?

A. I was given the maximum, 30 days.

Q. 30 days in the guardhouse?

A. Yes sir.

Q. You spent that in there and served your sentence?

A. Yes sir.

Q. Since that time you hadn't ever been arrested?

A. No sir.

The COURT: Where did you serve that sentence?

74 A. In my battalion guardhouse.

The COURT: Whereabouts?

A. Camp McCoy, Wisconsin.

Q. Since you had been overseas and fighting there in Patton's Army, had you ever been accused of being drunk or disorderly?

A. No sir.

Q. You tell this Court that you never had drunk heavily?

A. No sir.

Q. —up until the time of this rape charge. You don't know whether you did then or not, do you?

A. No sir.

Q. Shortly before that time had you had any symptoms of being under an extraordinary strain of any kind by reason of your battle and being in battle?

A. Well, sir, it just—you couldn't tell. One day you might hit it heavy and the next day you might hit the opposition light.

The COURT: What was the general route of the advance of your combat unit?

A. I don't know, sir.

The COURT: What general route did you travel? What towns did you go through?

A. I know about two towns. One of them was Frankfort. One of them was Frankfort. We went through Nancy, France.

75 Q. According to Captain Graham——

The COURT: I was asking him.

A. I don't remember what route we taken.

The COURT: What town was it where this thing happened?

A. I don't know, sir. My record of trial shows Immerath.

The COURT: Were you stationed there, or were you just passing through, or what?

A. I don't know, sir.

The COURT: Do you recall whether you were drinking that night or not?

A. Well, sir, in my mind I really don't recall. I was told by men in my company that I had been drinking and had been in a card game that night.

The COURT: All right.

Q. Now, you have been confined in the penitentiary since the date of that trial?

A. Yes sir. Almost four years.

The COURT: Where were you confined over there?

A. Well, sir, about the first place that I know they had me confined was in the deathhouse at La Mons, France, in the death cell there.

The COURT: How long did you stay there?

A. Almost six months, sir.

The COURT: Where did you go from there?

A. Went out to the Lorre DTC, disciplinary training center.

76 The COURT: How long did you stay there?

A. I only stayed there a month or so. I was waiting shipment back to the states.

The COURT: Where were you taken from there, what port, Brest or Bordeaux or Marseille or where?

A. I am not sure.

The COURT: What ship did you come back on?

A. I don't know.

The COURT: Where were you taken when you landed in the United States?

A. We were taken to New Cumberland, Pennsylvania.

The COURT: How long did you stay there?

A. Two or three days.

The COURT: At what place were you confined there?

A. Just in the disciplinary barracks.

The COURT: What place were you taken from there?

A. U. S. Disciplinary Barracks—Federal Penitentiary, Terre Haute, Indiana.

The COURT: How long were you in there?

A. From February, 1946, to August, '48.

The COURT: Who filed your writ of habeas corpus up there?

A. Mr. Covey I believe it was, sir.

The COURT: How did you get in touch with him? Did you do it through the prison authorities?

A. Yes sir. They would let me write him if I wished to write him.

77 They would let me write a special purpose letter.

Mr. CARNEY: I will explain that.

The COURT: Just a minute, Judge Carney. Let me question him. Did you write him and did he advise you there in the prison?

A. Yes sir. I wrote him and he advised me there in the prison.

The COURT: And you gave him the facts upon which to base your application for petition for writ. Is that correct or not?

A. Well, no sir, I don't——

The COURT: Well, do you say that is or isn't correct now? Did you give him the facts upon which to base his application for writ of habeas corpus?

A. No sir.

The COURT: You didn't?

A. No sir.

The COURT: You don't know where he got those?

A. I gave him my record of trial is all.

The COURT: And asked him to file this petition?

A. Yes sir.

The COURT: How long were you confined there?

A. At Terre Haute?

The COURT: Yes.

A. I believe it was February, '46, to August of '48.

The COURT: And you have been at the Correctional Institution at Texarkana since then?

78 A. Yes sir.

The COURT: You have never had any trouble at any time during your period of confinement as I read your record.

A. No sir. I have never had any disciplinary action or action of any kind.

The COURT: Never had any conflicts of any kind?

A. No sir. I have never had an argument since I have been in prison.

The COURT: And being in prison you didn't have any opportunity to obtain anything to drink, I assume.

A. No sir.

The COURT: All right.

Mr. CARNEY:

Q. I believe you say, Marton, in answer to questions from His Honor, while you were accused and tried according to the records over in Germany, the next you knew you were in a death house in France.

A. Yes sir. That's the next I knew. That was the first place I knew until they got me in the death house there and I stayed there almost six months and I got pretty settled there.

Q. You do have a present recollection of being in that death house now. You can remember that?

A. Yes sir.

Q. But between that point and the place back to where you were tried, have you got any recollection where you went, where
79 you were placed; anything about it?

A. No sir.

Q. I believe that is all.

The COURT: Any questions?

Col. VOORHIS: Just a couple, Your Honor please.

CROSS-EXAMINATION.

By Col. VOORHIS:

Q. What was your grade in the army prior to reduction?

A. I was Technician 4th Grade.

Q. Now, Captain Graham referred to you as Technician 5th Grade.

A. Well, sir, I had been put up. I was 5th grade technician before that, and I had been recently promoted.

Q. Then you were Tec 4th Grade?

A. Yes sir.

Q. Were you ever a technical sergeant?

A. I don't know what a technical sergeant is. I never heard of it in the army.

Q. Well, it is an enlisted man 2nd grade. Were were you on April 22nd of 1945?

A. I don't remember. I couldn't place the date.

Q. Did you write your mother occasionally while in the army?

A. Well, sir, yes sir. I guess I did.

Q. If I showed you a letter from your mother to some one else

that said she had received a letter from you dated April
80 22nd, would that refresh your recollection that you wrote her a letter immediately after your trial or within a week or so after you- trial?

A. Well, sir, I don't know whether it would or not.

Q. Do you recognize that writing?

The COURT: Is that your mother's handwriting?

A. No sir. That is not my mother's writing.

Q. Is that your mother's name?

A. Yes sir.

Q. Do you or do you not now know whether you wrote the letter referred to in this letter?

A. I do not.

Q. Does your mother write?

A. Yes sir. I receive letters from her now.

The COURT: Well, did you write her after the outcome of this trial?

A. Well, sir, I don't know whether I wrote her or not.

The COURT: Did you get this letter from her?

Col. VOORHIS: This is not a letter to him, sir.

A. It is the first time I ever saw the letter.

The COURT: Did you write your mother after the trial?

A. I don't remember writing her after the trial. The time I wrote her was down at La Mons.

The COURT: That was immediately after your trial when you were confined there?

81 A. I don't know how long after I was confined there.

THE COURT: All right.

Col. VOORHIS: I have no further questions.

Mr. CARNEY: That is all. That is all, Your Honor, from the Petitioner.

PETITIONER RESTS.

The COURT: Do you desire to argue this?

Mr. CARNEY: Yes, I would, Your Honor, shortly.

The COURT: All right. Proceed.

ARGUMENT ON BEHALF OF PETITIONER

Mr. CARNEY: As I stated in the beginning, Your Honor, the law is pretty well settled now that a court such as this may inquire into a charge of this nature under the due process law of the Fifth Amendment. It has been held by the Supreme Court of the United States that due process under the Fifth Amendment applies to a soldier.

The COURT: Well, we will concede that.

Mr. CARNEY: Concede that. All right. And also it has been held by the courts that a failure to follow the law as laid down in the code for the benefit of a soldier is want of due process, if it is a material and substantial nature—if it is of a material and substantial nature. Do you want argument on that?

82 The COURT: Just whatever you wish to argue.

Mr. CARNEY: I thought you might concede that like you did the other. Maybe counsel will. Will you concede that?

The COURT: He will concede that that regulation you read from exists.

Mr. CARNEY: You what?

The COURT: I assume that he will concede that that regulation you read from exists. It is the natural concern of any tribunal to see that any person tried for a crime is responsible for the crime with which he is charged, and this record demonstrates that every practicable precaution under military law had been complied with, because he was given a psychiatric examination before the trial and found competent for trial.

Mr. CARNEY: That is right. Now, then this code has a good many provisions in it. The law makers were very zealous to see that nobody who wasn't in mental condition was tried for a crime by court-martial, and I am not going to attempt to read all these things to Your Honor.

The COURT: Well, here is your trouble, Judge Carney. The record shows that out of an abundance of precaution and in conformity with that regulation that these proceedings were had in accordance with the general rules and regulations providing for the discipline of the military forces. And they made this examination and

83 found he was responsible for his crime and tried him and gave him every right to which he was accorded or entitled. And these things, statements of Captain Pellettieri and Captain Graham and Sgt. Goolsby are intimations of their individual belief that the man is probably not responsible, and if they were brought to the attention of the Commanding General, I think it was within his discretion to determine whether or not they merited any further action and that he was not obligated to order a new trial or commute sentence or anything else based on such flimsy grounds. I don't think this man was deprived of anything to which he was entitled.

Mr. CARNEY: Let me see if I can convince you against your will.

The COURT: I don't believe you can. He has been accorded every right to which he was entitled.

Mr. CARNEY: Let's see if he was. Let's examine that. That is a pretty broad statement.

The COURT: The thing about it, it comes down to—I can understand how these statements of Captain Pellettieri and Captain Graham and Sgt. Goolsby were made, but they were just individual beliefs without any basis in fact.

Mr. CARNEY: That is sufficient under this law to call it to the attention of the Court. Listen to this language: "The reviewing authority"—and they had before them these statements.

The COURT: All right.

84 Mr. CARNEY: "Will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time." —Not was insane, not had been adjudicated insane, but that he may have been insane.

The COURT: Well, they did the same thing in reviewing these statements, because they are not based on any solid statements of fact.

Mr. CARNEY: Don't make up your mind yet. Wait a minute until I get through. "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense or at the time of his trial, or regardless of whether the question was raised at the trial below or how it was determined if raised."—Now, what else on earth could bring it to the attention of a court or a reviewing authority more than was done. His own lawyer, Captain Matisin, says, "I began to get a suspicion at the trial that the man wasn't right. I couldn't get anything out of him during the trial. He wasn't responsive to me; couldn't find out then. Then I took him to Dr. Pelettieri and Dr. Pellettieri examined him and made a statement that in his opinion he wasn't right." Captain Graham made a statement he wasn't right. Goolsby made a statement. All that went into this record. But here is the crowning thing about it. When they presented that to the members

85 of that court, five members of that court said that he ought to have this examination provided for in this law. It would be a shame on the jurisprudence of the whole country, Your Honor, to allow a boy whose own court, before whom he was tried, the members of that court said that they thought he ought to have a neuropsychiatric examination as provided by this law and in spite of that fact, in spite of these statements and in spite of the recommendation of the members of that very court, five of them out of six, the reviewing officer arbitrarily passed it aside and didn't order it done in violation of this law here which said that he shall have it. The record shows this was before the reviewing authority, and in spite of that and in spite of this law which says if there may have been, where it appears from the record or otherwise, in other words, somebody could have just written him a letter and said, General, this boy wasn't right when he was tried. Under this law in my

opinion it was his duty and he deprived the defendant of a valuable right amounting to the want of due process of law when he didn't order it done. Not order him discharged. No. Just order him to go before a board and see whether or not. That is what the law says he shall do and they didn't do it. It is a flagrant violation of his rights under the due process clause because they didn't at-
86 tempt to carry out this provision in this law made for his benefit. And the courts say that if a failure to carry out this or a material matter amounts to a failure of due process of law, we will turn them loose. I have got decision after decision here to read.

The COURT: Well, there is no question about that conclusion, but the point about it is that the record doesn't justify any such action, and these opinions are just the flimsiest things I ever heard, because they don't have any solid basis in fact and the fact is that he was given an examination to determine his responsibility for trial before trial. All right.

Col. VOORHIS: That in my opinion, Your Honor, is the nub of it. All that the defense counsel asked for was a neuropsychiatric examination.

The COURT: That had already been done.

Col. VOORHIS: He had had that within ten days or two weeks before trial by a competent duly assigned neuropsychiatrist.

The COURT: The controlling thing about that.

Mr. CARNEY: Just a minute. Let me answer that. I overlooked it. I want to tell you about that. You take the examination of Captain Segel himself, and it is enough to put that court and the reviewing authority upon notice that there might have been something wrong with this boy.

The COURT: It isn't. That is not true.

87 Mr. CARNEY: Here is what he says——

The COURT: I heard what he says.

Mr. CARNEY: He said he had the intelligence of an eleven year old boy.

The COURT: Yes.

Mr. CARNEY: They tried an eleven year old boy for rape and condemned him to death and he says it is a borderline case. That is enough in my opinion to come in this law.

RULING OF THE COURT

The COURT: He might not have had a high rating, but they determined his mentality. While he might have had an eleven year old mind, his other equipment was more developed than that, evidently was. He has been accorded every right in my opinion he is entitled to, and in my opinion he was given a fair trial, and he

remembers everything that happened before and after except during this critical period and I don't think there is any ground for any claim of denial of rights and I am going to deny the writ, and return him to the custody of the Marshal, and You will have your exception to that action.

Mr. CARNEY: Will Your Honor give me the right to appeal? I give notice of appeal.

The COURT: Certainly.

Mr. CARNEY: Will you allow me to appeal as I came in to this court, in forma pauperis?

The COURT: If there is no objection on the part of the Government or if they have no information to the contrary.

(End of hearing)

88 Reporter's Certificate to foregoing transcript omitted in printing.

88a **Excerpts From Respondent's Exhibit No. 1**

REPORT OF INVESTIGATION OF CHARGES
MARCH 24, 1945

* * * 8. I have no reasonable ground for belief that the accused is, or was, at the time of any offense charged, mentally defective, deranged, or abnormal. * * *

88b HEADQUARTERS 89TH INFANTRY DIVISION

Office of the Surgeon

APO 89 US Army
25 March 1945

SUBJECT: Psychiatric examination of Pvt Marton L. Whelchel, ASN 18038433, Co C, 602nd TD Bn. Age 22 years. Four years in the Army.

TO: Assistant Chief of Staff, G-1, 89th Infantry Division APO 89 US Army.

Present Complaint:

This soldier's version of his present difficulty is as follows: On the evening of 14 Mar 45 he was in the securities section and borrowed a thousand francs from a friend. With it he played poker until 2200 and then returned to his section. They were having a drinking party during the course of which he drank two-thirds of a bottle of white wine. The party broke up about midnight. "We

all went to bed and fell to sleep and I didn't get up until the next morning. The next morning both girls picked me out but I never had anything to do with them. I believe I had seen her in town before and that is how she may have known me."

Family History:

Father died at the age of 35 from some unknown cause when soldier was four years old. Mother is 68 years old and has been married three times, her previous husband having died each time. She is considered a rather nervous woman and is a- enthusiastic follower of the Holy Roller Church. He has three full sisters who are alive and well and four half-sisters who are also alive and well. There is one full brother who is in the Army somewhere in the ETO. Another brother was killed in the Pacific theatre and he has a half-brother at home who is a cripple. There is no family history of mental or nervous diseases but all members of the family, with the exception of the Mother, drink heavily.

Personal History:

Medical History: He had the usual childhood diseases and tho he denies any history of venereal disease, he was treated for a "strain" (urethral discharge), in 1944.

Social History: As a child he had no fits, convulsions, temper tantrums, of sleep walking and he doesn't recall being enuretic. He comes from the state of Texas and says he always enjoyed company and made friends easily. However, the only sport he ever indulged in was playing cards. He reached the sixth grade in school and quit at the age of twelve years after repeating a number of grades. He always found school rather difficult. He had been drinking rather heavily as far back as he can remember and even states that his father started them off drinking beer as infants because he felt "it was healthy."

88c The soldier was married in 1941 at the age of 19 to a girl of 18. There were no children by the marriage. While he was at camp, his wife "just got to going with a sailor and wanted a divorce." This was granted on the grounds of cruelty. He was a chronic nail-biter and always mildly nervous. He started driving a truck for his brother-in-law at the age of 13 and kept this job until entering the Army.

Army Record:

In 1943 he was arrested for drinking, in the course of which he "whips some MP's and shut them in a back room of a tavern". For this he received 30 days of hard labor and was reduced from Pfc. to Private. The highest grade he ever held was a T/4 as a tank

driver for one and one-half years. Early this month he just got tired of it and asked to be reduced to his present rank of private. He denies the use of any drugs and is not a member of any church.

Mental Examination:

Attitude and General Behavior: Although this soldier was superficially cooperative, one got the definite impression that much material was definitely being withheld. He revealed a low level of intelligence and his story was such that might have been concocted by an individual having a minimum of native shrewdness.

Stream of mental activity: His speech was guarded at times and the coherent and relevant, lacked conviction.

Emotional reactions: He was tense and guarded throughout the interview. He fidgeted all the time. There was no discrepancy, however, between emotional expression and thought content.

Content of thought; mental trends: There was no evidence of dillusions, hallucinations, grandosity, or hypochondriacal trends. He was asked, in view of his own inadequate explanation, whether he thought someone was trying to frame him. He jumped at the opportunity to answer this question and said "Maybe the Germans were trying to get even with us for having been put out of their homes."

Orientation, mental grasp, and capacity: He is oriented for time, place, and person and both remote and recent memory are adequate. His school and general knowledge was poor. On the Wechsler-Belleveau intelligence test he scored a mental age of 11 years and 5 months and an IQ of 71.

Insight and judgment: He constantly refused to alter his story in regard to his activities and felt as tho nothing could be proved against him. He admitted that the act of rape was a serious crime and deserved severe punishment.

Summary and Conclusions: Throughout the interview with this man one had the impression that here was an individual of borderline normal intelligence who is withholding some information. He must be considered legally sane and his personality is in keeping with that of a borderline mental defective with psycopathic traits.

NATHAN P. SEGEL,
Captain, MC,
Div Neuropsychiatrist.

88d DIVISION STAFF JUDGE ADVOCATE'S REVIEW OF THE CHARGES

Headquarters 89th Infantry Division
Office of the Staff Judge Advocate

APO 89, U.S. Arm,
27 March 1945

Subject: Joint Charges Against T/5 Elmer L. Spohn * * * and Pvt. Marton L. Whechel * * *
To: Commanding General, 89th Infantry Division, APO 89, U.S. Army

* * *

7. * * * It is recommended that:

* * *

d. That Captain Segel be directed to transmit his reports to the commanding officer of the unit concerned through the investigating officer. * * *

FRANK M. GLEASON,
FRANK M. GLEASON,
Major, J.A.G.D.,
Staff Judge Advocate.

Headquarters 89th Infantry Division
Office of the Staff Judge Advocate
APO 89, U.S. Army

27 March 1945

Subject: Memorandum report on courts-martial charges.
To: Commanding General, 89th Infantry Division, APO 89, U.S. Army.

Grade, name, serial number, and organization of accused.

Private Marton L. Whelchel, 18038433, Company C, 602nd Tank Destroyer Battalion * * *.

1. * * * there is no reason to believe that the accused may be mentally defective or deranged, either temporarily or permanently. * * *

FRANK M. GLEASON,
FRANK M. GLEASON,
Major, J.A.G.D.,
Staff Judge Advocate.

88e

HEADQUARTERS

EUROPEAN THEATER OF OPERATIONS

UNITED STATES ARMY

UNITED STATES

v.

PRIVATE MARTON L. WHELCHEL, 18038433, Company C, 602d Tank Destroyer Battalion

REVIEW BY STAFF JUDGE ADVOCATE

1. *Trial.* Accused was tried at Immerath, Germany, on 10 April 1945 by a general court-martial appointed by paragraph 1, Special Orders No. 32, Headquarters 89th Infantry Division, United States Army, 26 March 1945.

2. *Charges and Specifications.* The offenses involved were (R 4):

		Pleas (R 5)	Findings (R 30)
Charge I	: Violation of Article of War 92.	NG	G
Specification:	Rape of Fraulein Hildagard Thull, 14 March 1945	NG	G
Charge II	: Violation of Article of War 93.	NG	G
Specification:	Assault upon Fraulein Helga Thull with intent to commit rape, 14 March 1945.	NG	G

3. *Sentence. a.* Accused was found guilty by *unanimous* vote of the members present, and was sentenced by *unanimous* vote of the members present on 10 April 1945 to be hanged by the neck until dead (R 32).

b. The convening authority approved the sentence on 19 April 1945 and forwarded the record of trial for action under Article of War 48 (page following R 32).

4. *Service Data.* Accused is 22 years old; he enlisted on 15 January 1941; there were no previous convictions (R. 31).

5. *Prosecution Evidence.* On 14 March 1945 (R 6, 11, 16) at approximately 2300 hours (R 6, 20), accused and Technician Fifth Grade Elmer L. Spohn, co-accused (R 8), were, in response to persistent knocking on the door, admitted into a house in Immerath, Germany, then occupied by Matthias Thull, his wife, his daughters Hildagard and Helga (R 7), ages 16 (R 11, 19) and 13 (R 11) respectively, his son Ginder (R 7), and his brother-in-law, Joseph Schmitz (R 11). The mother and children occupied two beds in a

room upstairs (R 7), and Matthias Thull (R 6) and Joseph Schmitz slept downstairs (R 11). Upon entering, accused and Spohn indicated they wanted to sleep in the kitchen. When Matthias told them there was no room, they went upstairs. As Matthias Thull started to follow them, accused shoved him, struck him on the chest with his gun and forced him to remain downstairs (R. 6). After the two entered the upstairs room, they sat on the bed occupied by the girls, gave each a bar of chocolate and indicated they wanted to sleep on the floor (R. 16). Hildagard was frightened and cried. The two girls dressed and tried to get out of the room (R 16) but accused (R 11, 16, 21, 22), who stood in front of the door, pointed a gun at them and did not permit them to leave (R 16, 21). In response to a call from his wife, Matthias came upstairs (R 7, 16, 21). Accused and Spohn indicated they wanted to have the girls and repeatedly used the word "fuck," a term the Thull family did not understand (R 7, 21). Since Joseph Schmitz could speak a little English, Mrs. Thull called him upstairs (R 7, 11, 16). Accused announced that he and Spohn wanted to "fuck" the two girls (R 11) and demanded that Schmitz tell the girls what they wanted. When Schmitz protested the girls were too young, accused (R 12), covering him with his carbine (R 7, 12, 21) and representing himself as an "SS American soldier" (R 15), threatened to shoot the
88f entire family if he did not do as ordered and "if it didn't happen in two minutes" (R 12). Joseph Schmitz then told Hildagard she had to sit on accused's lap (R 17). Hildagard replied that "she didn't want to; that she was afraid" (R 13). While this was happening, Spohn sat on the bed, vomited (R 8, 16), and went to sleep (R 16). Accused forced everyone in the room except Spohn and the girls to get into one bed (R 8, 13) and took Hildagard over to the other bed. Matthias Thull tried to get up and go over (R 13) but accused pushed him and directed him to remain where he was (R 13, 21). Hildagard sat on accused's knee (R 8, 17). When accused started play around with her pants, Hildagard hollered "mother" and tried to get away but accused would not let her (R 8). Finally, accused hit her over the head with his gun, put her arm around him, removed her pants, and shoved her onto the bed. She tried to get away but accused pulled her back (R 17), and, in spite of her resistance, had intercourse with her (R 18). After spending approximately one hour with her (R 18, 21) [Matthias Thull estimated accused was with her "at least fifteen minutes or longer" (R 9)], accused called Spohn (R 14, 18) and asked him whether he wanted to "fuck" Hildagard, to which Spohn replied in the affirmative (R 14). Accused made some unsuccessful advances at Mrs. Thull (R 9, 19, 21) and then stated he wanted Helga (R 14), to whom he referred as the "kiina booby" or little baby (R 10). Joseph Schmitz protested that Helga was a mere child but accused pulled

her to him (R 14), and, while she was crying and shouting "Mother, mother, I'll die" (R 14, 19), accused removed her pants (R 10), made her take hold of his penis (R 10, 22), lay on top of her (R 19, 21) and "used" her (R 10, 21). After a short while (R 19), accused and Spohn got up (R 10), took their guns (R 22) and their bottles (R 14) and left, locking the door from the outside (R 10). In the opinion of Matthias Thull, accused had apparently been drinking but "you couldn't tell whether he was drunk or not" (R 10). In the opinion of Joseph Schmitz, accused was a little drunk but "he hadn't lost his senses" and was able to carry on a conversation (R. 15). In the opinion of Hildagard, accused "certainly knew what he was doing" (R 20), and in the opinion of Helga, accused was drunk (R 22). The battalion surgeon examined Hildagard and Helga the following day and found the entrance to Hildagard's private parts swollen and purplish. There was a tear of the hymen and a small blood clot at the lower end of the tear. He found nothing on Helga (R 23). On cross-examination he stated that the swelling and discolorations on Hildagard could have been caused by self-abuse, foreign abuse or "from a number of things" (R. 23-24). Lieutenant Robert E. Graham, who testified that accused was in the military service, on cross-examination stated that accused "was one of the best tank destroyer drivers in the ETO" (R 24).

6. *Defense Evidence. a.* On 14 March accused played cards with four other soldiers until between 2300 and 2400 hours (R. 25). Between these hours the group moved to another place and accused, who had lost his money and was too drunk to play, did not accompany them (R 26).

b. Accused was advised of his rights as a witness and elected to remain silent (R 27).

c. Spohn testified under oath in his own behalf, during which he stated that on the evening of 14 March he and accused were drinking wine "or whatever it was." At some hour and by some means that he could not recall, he and accused entered a house, went upstairs and there heard Germans talking. He went to sleep because he was not feeling well. He was later awakened by accused who asked him whether he wanted to "fuck with this girl." While Spohn was trying to have intercourse, accused and "this other girl got on the bed." After a short time accused suggested they leave, which they did (R 27). During the brief period he was awake, after first entering the room, the occupants of the house did not argue with him and accused (R 28).

7. *Discussion. a. Specification of Charge I (Rape of Hildagard):* The essential elements of this offense are: (a) That accused had carnal knowledge of a certain female, as alleged, and (b) that the act was done with force and without her consent (MCM, 1928, par

148*b*). Although some hearsay testimony was admitted in this case, the net effect of the competent prosecution and defense evidence warrants the conclusion that accused had carnal knowledge of Hildagard against her will. The major portion of the testimony is that of enemy nationals and, as such, must be accepted with caution. However, this evidence was substantially corroborated by the undisputed evidence from friendly sources. Spohn, the co-accused, established the presence of accused at the place where the alleged offense
88g occurred and confirmed the testimony of the members of the Thull family that accused invited co-accused to have intercourse with Hildagard. The casual manner in which accused suggested that Spohn have relations with Hildagard justifies the inference that he himself had finished with her and that she was then available to Spohn. Hildagard's testimony that the penetration was effected is confirmed by the testimony of the medical officer that the entrance to Hildagard's private parts was swollen and discolored, and that there was a small blood clot at the lower end of the tear of the hymen. The absence of consent, likewise, does not rest solely on the testimony of the members of the Thull family. It was established that accused and Spohn entered the Thull dwelling at night as uninvited intruders. Spohn testified that Mr. and Mrs. Thull and the two girls were in the room where the alleged rape took place (R 28). Human experience favors the assumption that a girl of 16 would not, in the presence of her parents, consent to the act of sexual relations. This circumstantial evidence renders the prosecution testimony not merely plausible but compelling that accused overpowered Hildagard either by force or fear, or both. The evidence is that accused was under the influence of liquor at the time of the offense. "Intoxication, while no excuse for crime, can be set up as a defense in a prosecution for rape, where the degree of intoxication was such as to render the accused incapable of forming an intention to ravish the prosecutrix * * *" (1 Wharton's *Criminal Law*, 12th Ed, Sec. 753). The evidence is clear that accused, though under the influence of liquor, was conscious of what he was doing. The finding of guilty is, therefore, sustained by the evidence.

b. Specification of Charge II (Assault upon Helga with intent to commit rape): This offense "is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished * * * The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and consur with the assault" (MCM, 1928, par 194*b*). Every essential element of this offense was established beyond a reasonable doubt. Although Helga's testimony that accused "used her" (R 21) is discredited by the negative findings of the medical officer, there is no doubt that accused lay on the bed with her. This fact is definitely confirmed by the testimony of the co-accused. What was said about

the element of consent with respect to Hildagard is equally applicable to this offense. It is inconceivable that, under the circumstances, accused had the 13-year-old child's consen to lie on the bed with her. That is the most aggravated element of the assault from which the intent to commit rape may be inferred. The other facts alleged in the specification, that accused removed Helga's step-ins and forced her on the bed, is established by Helga's own testimony and is supported by Hildagard's testimony. The evidence is conflicting on the issue of the extent of accused's intoxication. An analysis of all the testimony in the case, however, supports the court's apparent conclusion that accused was not so intoxicated as to prevent him from forming the specific intention to commit rape. The finding of guilty of this offense is, therefore, sustained by the evidence.

c. The following irregularities not affecting the substantial rights of accused, and not mentioned in the original review, are noted. Accused and Spohn were charged jointly in the perpetration of a felony, the rape of Hildagard (Specification of Charge I), and accused was charged separately for the assault with intent to commit rape upon Helga (Specification of Charge II). The record does not disclose that the several accused affirmatively consented to such trial. Under similar circumstances it has been held that even had the defense interposed a motion for severance of the trial, the court would have been authorized to deny the motion. The consent of each accused to be tried together was, therefore, not necessary (CM ETO 3740, *Sanders et al*). However, this was a common as well as a joint trial, and accused was entitled to a peremptory challenge independent of any that might have been extended to Spohn, the co-accused (Dig Ops JAG, 1912-40, Sec. 395(33)). Since the defense stated "The defense has no challenges, either for cause or peremptorily," and since the record recites "The accused were then asked if they objected to any other member present, to which they replied in the negative" (R 3), no prejudicial error has resulted from the failure to tender formally to each accused the right to exercise one peremptory challenge. After Matthias Thull admitted that he understood no English (R 6), he was permitted to testify as to the conversation in English that took place between accused and Joseph Schmitz (R 7), that accused told Hildagard she had to sit on his lap (R 8) and that accused threatened to shoot them (R 9). Hildagard, who also understood no English (R 7), was permitted to testify that accused told her uncle that she had to sit on accused's lap (R 16), and that accused threatened to "shoot us all" (R 17). 88h. This evidence is clearly hearsay, to be distinguished from the directions given in German by Schmitz as the mouthpiece of accused who had asked Schmitz to inform the girls of what he was saying (R 12). However, since the testimony on lack of consent is established by competent testimony corroborated by ample cir-

cumstantial evidence, these errors are not deemed to prejudice the substantial rights of accused. The record fails to mention that the witnesses withdrew from the courtroom after being excused. A copy of this review will be furnished the staff judge advocate of the convening authority.

8. *Opinion of Staff Judge Advocate.* The record of trial is legally sufficient to support the findings and sentence and discloses no error injuriously affecting any substantial rights of accused.

9. *Clemency.* There is no recommendation for clemency in this case. Accused is 22 years old and, during his service, was divorced by his wife. He completed the sixth grade, had no arrests in civilian life, and during more than four years of military service was tried once by a summary court. The investigating officer appraises his record as a soldier as "very good." The division neuropsychiatrist reports that accused is legally sane though he is a borderline mental defective with psychopathic traits. The evidence is that accused was under the influence of liquor while he committed the offense, although his intoxication was not such as to render him unaware of the nature of his conduct. However, it may be considered in determining the measure of punishment to be awarded (MCM, 1928, par 126*a*). Because of accused's relatively low mentality and because of my conviction that his intoxication contributed in a large measure to the offense, I recommend commutation of the sentence.

10. *Recommendation of Staff Judge Advocate.* I recommend that the sentence be confirmed and commuted to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, and submit herewith an appropriated form of action. Upon such confirmation it is requisite that the order directing the execution of the sentence be withheld and the record of trial forwarded for action by the Board of Review and Assistant Judge Advocate General, Branch Office with the European Theater of Operations, pursuant to Article of War 50½.

ABRAHAM S. HYMAN,
Captain, JAGD,
Assistant Staff Judge Advocate.

Having read the record of trial, I concur.
ED. C. BETTS,
Brigadier General, U.S.A.
Staff Judge Advocate.

June 1945.

88i HEADQUARTERS 89TH INFANTRY DIVISION

APO 89, US Army
27 April 1945

Subject: General Prisoner Marton L. Whelchel, 18038433, 602d Tank Destroyer Battalion.
To: Commanding General, ETOUSA, APO 887, US Army.

1. General Prisoner Whelchel was jointly tried with General Prisoner Elmer L. Spohn by general court-martial 10 April 1945 for the offense of rape in violation of Article of War 92. The court found him guilty and imposed a sentence of death by hanging. Spohn was sentenced to imprisonment for life. Both sentences were approved and the record of trial forwarded to your Headquarters for action under Articles of War 48 and 50½.

2. The attached request from Defense Counsel, together with concurrence of the court members therein, with the statements of Captain N. W. Pellettieri, First Lieutenant Robert E. Graham, and Sergeant Harry P. Goolsby, forwarded herewith, indicate that there is some question of this man's sanity. He was however, examined by the Division Neuropsychiatrist before case was referred for trial and found legally sane.

For the Commanding General:

V. J. BLONDELL,
Lt. Col., A. G. D.,
Adjutant General.

4 Incls:
#1—3 n/c.
#4 added—Ltr of Defense Counsel.

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89 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, TEXARKANA DIVISION

Civil No. 262

MARTON L. WHELCHEL, PETITIONER

vs.

A. MCDONALD, WARDEN, RESPONDENT

ORDER OF DISMISSAL

Filed Feb. 21, 1949

On this, the 18th day of February, 1949, came on for hearing, at Tyler, Texas, the Order of this Court, directing the Respondent, A. McDonald, Warden, Federal Correctional Institution, Texarkana,

Texas, to appear and show cause why the Petition of the said Marton L. Whelchel for a Writ of Habeas Corpus should not issue.

The said Warden made answer to the Order to show cause, and, among other allegations, answered that he held the Petitioner, Marton L. Whelchel, in custody in the Federal Correctional Institution, Texarkana, Texas, by virtue and under authority of General Court Martial Order No. 388, Headquarters United States Forces European Theatre, dated September 6, 1945. The Respondent Warden further made answer to the allegations in the Petition for a Writ of Habeas Corpus.

The Petitioner, Marton L. Whelchel, was brought before the Court by Respondent, and appeared in person and by an attorney of his own choosing. The said Warden appeared in person and by the United States Attorney and Lieutenant Colonel Nicholas R. Voorhis, the latter appearing as counsel to the United States Attorney by permission of the Court. The Petitioner and Respondent each announced ready for the hearing. Evidence was introduced by the respective parties.

90 Upon consideration of the pleadings and evidence introduced by the respective parties, the Court finds that the General Court Martial, by which Petitioner was tried and sentenced, was appointed, composed, and organized in accordance with the laws of the United States and had jurisdiction to hear the charges against Petitioner; that the proceedings of said Court Martial were in all things in accordance with the laws of the United States, and that every right guaranteed to the Petitioner was fully protected as required by law.

The Court concludes that the Petition for a Writ of Habeas Corpus is without merit, and that the custody of the Petitioner, Marton L. Whelchel, by the Respondent, A. McDonald, is in all things in accordance with law.

It is, therefore, Ordered that the Petition of the said Marton L. Whelchel, for a Writ of Habeas Corpus be, and the same is hereby dismissed, and the Petitioner, Marton L. Whelchel, is hereby remanded to the custody of the Respondent, A. McDonald, Warden

(S.) RANDOLPH BRYANT,
United States District Judge
Eastern District of Texas.

91–95 In the United States District Court

[Title omitted]

NOTICE OF APPEAL

Filed Feb. 28, 1949

To the Honorable Judge of Said Court:

Now comes the petitioner in the above case and after judgment of the court remanding him to the custody of respondent herein, gives notice of appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit, New Orleans, Louisiana.

CARNEY, CARNEY & MAYS,
By (S.) HUGH CARNEY,
Attorneys for Petitioner.
(S.) MARTON L. WHELCHEL,
Petitioner.

Sworn to and subscribed before me by the said Marton L. Whelchel, Petitioner, this the 28th day of February, 1949.

[SEAL.] (S.) LOUIS A. HUBER,
Notary Public, Bowie County, Texas.

96 Clerk's Certificate to foregoing transcript omitted in printing.

97 In the United States Court of Appeals for the Fifth Circuit

No. 12760

MARTON L. WELCHEL

versus

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 8, 1949

On this day this cause was called and after argument by Hugh Carney, Esq., for appellant, and Reginald C. Miller, Lieutenant Colonel, J. A. G. D., for appellee, was submitted to the Court.

98 In the United States Court of Appeals for the Fifth Circuit

No. 12760

MARTON L. WHELCHEL, APPELLANT

versus

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Texas

(July 22, 1949)

Before HUTCHESON, SIBLEY, and WALLER, Circuit Judges

OPINION OF THE COURT—Filed July 22, 1949

SIBLEY, Circuit Judge:

Appellant, Marton L. Whelchel, was tried and convicted for rape on a German girl and sentenced to death by a general court-martial held at Immerath, Germany, on April 10, 1945, he being a private in a Tank Destroyer Battalion on active war duty. The sentence was commuted to life imprisonment by General Dwight
99 D. Eisenhower. Later the President, on July 16, 1947, reduced the term to twenty-one years. On Jan. 10, 1949, discharge was sought by habeas corpus in the District Court for the Eastern District of Texas, but after a hearing the imprisonment was held lawful and Whelchel was remanded to custody.

On this appeal two points only are argued: 1. The court was composed of officers alone, with no provision of law for including any members of the private soldiers' class, contrary to the Fifth and Ninth Amendments of the Constitution. 2. The reviewing authorities failed, on notice of the probable insanity of the accused at the time of the offense and of his trial, to halt the execution of the sentence and have a thorough psychiatric examination made of him pursuant to Section 87(b) of the then Manual for Courts-Martial, and thereby deprived him of due process of law.

The Court-Martial record shows the court to have been organized according to the Articles of War, and to have proceeded regularly, the accused being represented by counsel of whom no complaint was or is made. It was composed wholly of commissioned officers, as provided by Article of War 4, (10 U. S. C. A. Sect. 1475). Such a provision has been in all the Articles of War enacted since the adoption of our Constitution, and was in the British Articles of War of

1765, and in the American Articles of War of 1776. See Winthrop's Military Law and Precedents, Second Edition, pages 931 and ff. So far as we are informed never before has it been urged that there is constitutional infirmity in the provision. In *Kahn vs. Anderson*, 255 U. S. 1, a sentence was imposed in the United
100 States in time of peace, and the Articles of War were attacked as not providing for indictment and jury trial according to constitutional provisions. The court said, page 9: "In connection with this subject we observe that a further contention that, conceding the accused to have been subject to military law, they could not be tried by a military court because Congress was without power to so provide consistently with the guaranties as to jury trial and presentment or indictment by grand jury respectively secured by Art. 1, Sec. 8 of the Constitution, and Art. 5 of the Amendments, is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained—a situation which was so obvious more than forty years ago as to lead the court to say in *Ex parte Reed*, 100 U. S. 13, 21, 25 L. Ed. 538: 'The constitutionality of the Acts of Congress touching Army and Navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const. Art. 1, Sect. 8; Amendment 5. In *Dynes vs. Hoover*, 20 How. 65, 15 L. Ed. 838, the subject was fully considered and their validity affirmed.'" The application of these constitutional provisions to trial by military commission, in lieu of court-martial, under the Articles of War was elaborately reexamined in *Ex parte Quirin*, 317 U. S. 1, 87 L. Ed. 1, with the same result.

The contrary argument is that under Magna Charta one's right to be tried by a jury of his peers was established, and is retained by the Ninth Amendment of the Constitution, and the status of
101 a private is so different from that of an officer as to make them completely different classes of persons; and that the Commanding General appoints the court and designates its members, and the whole set-up is aimed at discipline more than at preserving the rights of the accused. The Congress, impressed perhaps with such arguments, did recently alter Article of War 4, made under the authority of Constitution Art. 1, Sect. 8(14), so as to permit service of enlisted persons on the courts-martial for the trial of such persons. We are of opinion that the Constitution was not violated by the Articles hitherto in force on this subject.

2. It is truly argued that the military law is solicitous about the sanity of the accused, both at the time of the offense and at the time of trial. The Manual for Courts-Martial, in force in 1945, promulgated by the President as a procedural guide under Article of

War 38, 10 U. S. C. A. § 1509, provides in Section 30(c), "No charge will ordinarily be referred for trial if he (the appointing authority) is satisfied that the accused is insane or was insane at the time of the offense charged". Section 35(c) says: "An appointing authority may, in his discretion, suspend action on the charges pending the consideration of the report of one or more medical officers, or a board convened . . .," when insanity is suspected. Section 63 directs the court to enquire into the mental condition of the accused while the case is before the court, if it appears there is reason therefor in the interest of justice; and Section 75 directs the taking of additional evidence on the point if it appears to be in the interest of justice at any time before the sentence is imposed. Section
102 78(a) declares that one cannot be legally convicted if there is reasonable doubt as to his mental responsibility for the offense. Section 87(b) directs the reviewing authority also to take "appropriate action" if it appears that the accused may have been insane, "regardless of whether any such question was raised at the trial or how it was determined if raised." These provisions are all directory, relating to the exercise of jurisdiction, and do not limit jurisdiction. They resemble the rules of the law applied in civil courts in the trial of crimes. The plea of not guilty covers the question of sanity at the time of the oqense, and proof of insanity at that time may be offered under that plea. Insanity at the time of trial is a special issue ordinarily to be raised and settled before the trial begins. In the civil courts it has been held that the trial concludes both questions, and that insanity either at the time of the offense or at the time of the trial does not destroy jurisdiction, and cannot be asserted in a collateral attack by habeas corpus. *Whitney vs Zerbst*, 62 Fed. (2) 970; *Hall vs. Johnston*, 86 Fed. (2) 829; *Strigley vs. Sanford*, 148 Fed. (2) 264.* In view of the more limited interference by habeas corpus with the military courts, (See *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213; *Sanford vs. Robbins*, 115 Fed. (2) 435), we think the same rule should be applied here. It is no more appropriate for a habeas corpus court to try the sanity of an accused convicted by a court-martial than to try his guilt. Both questions are the responsibility of the court-martial and the reviewing authorities, including the President.

103 In this case there was a preliminary report to the Division Commander by the Staff Judge Advocate that there was no

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* See also 14 Am. Jur. Criminal Law, Sec. 46; 25 Id., Habeas Corpus, Sec. 84. But there is recent authority that habeas corpus may be available to attack a conviction in a civilian court. See Forthofer vs. Swope, 103 Fed. (2) 707; Ashley vs. Pecor, 147 Fed. (2) 318; Brewer vs. Hunter, 163 Fed. (2) 341; Moss vs. Hunter, 167 Fed. (2) 683.

reason to believe the accused mentally defective or deranged, either temporarily or permanently. The Division neuropsychiatrist had examined the accused and reported him legally sane, though of a low mental order. No issue of mental derangement was made in the trial. After conviction and sentence the defense counsel brought forward facts and opinion evidence to show derangement which was submitted to the reviewing authorities, along with a recommendation by five members of the court-martial that accused be given a thorough psychiatric examination. The evidence in the trial, especially that by his companion in the criminal enterprise, tended to show that they both were drinking, but there were no circumstances showing mental derangement at the time. Whelchel did not testify, and he claims now to be unable to remember anything about the affair. The reviewing authorities did not order a further psychiatric examination, but commuted the sentence from death to life imprisonment and finally to twenty-one years. The district court on habeas corpus properly refused to interfere.

3. Habeas corpus to review the action of another court is in its nature extraordinary, and will not be used, if available at all, till other remedies have been exhausted. *Goto vs. Lane*, 265 U. S. 393, 401. See also *Ex parte Hawk*, 321 U. S. 114. On Feb. 1, 1949, the amended Articles of War (Act of June 24, 1948, 62 Stats. (627) went into effect. Article 53 provides for the grant of a new trial or the vacation of a sentence for good cause shown within one year after final disposition of a court-martial case; and in cases involving
104 offenses committed during World War II, the application may be made within one year after termination of the war. The action taken on such application is expressly made binding on all courts of the United States. This remedy is much better adapted to reach justice than any within the power of the district court on habeas corpus. That it has not been sought here is within itself a sufficient reason for noninterference.

Judgment affirmed.

195 In United States Court of Appeals, Fifth Circuit

No. 12760

MARTON L. WELCHEL

versus

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION OF TEXARKANA, TEXAS

JUDGMENT

July 22, 1949

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

106 In the United States Court of Appeals

[Title omitted]

PETITION FOR REHEARING—Filed August 12, 1949

To Said Honorable Court:

Now comes the appellant in the above entitled and numbered cause and moves the court to set aside the judgment of this court, rendered on the 22nd day of July, 1949, affirming the trial court's judgment, and to grant him a rehearing, reverse the judgment of the District Court and order appellant released from custody, upon the following grounds, to-wit:

1. The Court erred in overruling appellant's Point One, wherein appellant set up the unconstitutionality of the court-martial,
107 in that, the law providing for the same was contrary to the Fifth and Ninth Amendments of the Constitution of the United States.

2. The Court erred in refusing to sustain appellant's Point Two, wherein appellant says that he was denied due process of law; in that the reviewing authorities in his court-martial proceeding arbitrarily and willfully refused to order a psychiatric examination of the appellant under Section 87b of the Manual for Courts-Martial, there being abundant evidence presented to the reviewing au-

thorities that the appellant was insane, both, at the time of the commission of the offense and at the time of trial.

3. The Court erred in holding that the remedy of writ of habeas corpus was not available to appellant because the defense of insanity should have been made in the trial by court-martial in view of the fact that appellant was incapable of presenting any defense by reason of his insanity and his counsel did not know about his insanity at the time of the trial, but when he did find it out about two weeks after the trial, he immediately presented evidence to the membership of the court that tried him and procured a recommendation from five members of the six man court, recommending a psychiatric examination for appellant.

4. The Court erred in holding that, because of the amended
108 Articles of War (Act of June 24, 1948, 62 Stats. 627), which went into effect February 1, 1949, appellant was precluded from raising the questions presented by habeas corpus; but the record shows that, (a) the appellant had already instituted the proceedings before the article took effect; and (b) more than a year has passed since the court-martial sentence and since the termination of the war. The statute is, thereby, ineffective to grant full relief to the appellant because there is no way that the Judge Advocate General's Department could now hold the psychiatric examination of appellant, which should have been ordered by the reviewing authorities at the time under Section 87b.

5. The Court erred in its holding with regard to the amended Articles of War (Act of June 24, 1948, 62 Stats. 627), "that it has not been sought here is within itself a sufficient reason for noninterference."

6. The Court erred in its holding wherein the court, said "Whelchel did not testify, and he 'claims' now to be unable to remember anything about the affair"; whereas, the record shows that Whelchel testified on the habeas corpus hearing before the district court, positively, that he knew nothing about the rape incident, or his trial, and there was no evidence introduced by the government contradicting his testimony at all, but on the
109 contrary, his testimony was supported by the testimony of Dr. Pellettieri, who saw him immediately after the court-martial and made a statement that, in his opinion, Whelchel was suffering from total amnesia of the whole incident. Dr. Pellettieri testified by deposition that in his opinion Whelchel was insane both at the time of the commission of the offense and at the time of the trial and knew nothing about either one. Captain Graham says Whelchel was insane. His sergeant said he was insane. His attorney says he was insane, and five members of the court-martial

said that after the matter was brought to their attention, that he should have a psychiatric examination. Opposed to all this is the mere fact that the psychiatrist who examined Whelchel in the preliminary, required before trial, stated, in his opinion, he was sane, but qualified it by saying it was a border-line case and the appellant had the mind of an 11 year old.

WHEREFORE, appellant prays that the judgment of this court be set aside and he be granted a rehearing and that on rehearing, the judgment of the district court be reversed and the appellant ordered released.

Respectfully submitted,

HUGH CARNEY,
Atlanta, Texas,
Attorney for Appellant.

110 A copy hereof was mailed to Warren G. Moore, United States Attorney, Tyler, Texas, Lieutenant Colonel Nicholas R. Voorhis and Lieutenant Colonel Reginald C. Miller, Office of the Judge Advocate General, Washington, D. C.

HUGH CARNEY.

111 STATE OF TEXAS,
County of Cass:

I, Hugh Carney, respectfully certify to the court that I am counsel for the appellant in the above styled and numbered cause, and that I, in good faith, have made the motion for rehearing, believing that on the law the court has erred in the particulars therein set forth. I also certify that I have mailed copy of this motion to the counsel for the appellee.

Given under my hand at Atlanta, Texas, this 10th day of August, 1949.

HUGH CARNEY.

112 In United States Court of Appeals

[Title omitted]

AMENDED PETITION FOR REHEARING—Filed December 8, 1949

To the Honorable Court:

Now comes the appellant in the above styled cause and respectfully prays the Court to allow him to file an Amended Motion for Rehearing upon the grounds of newly discovered evidence, bringing the case within the recent decision of this Honorable Court
113 in *Hiatt vs. Brown*, 175 Federal 2d 273, as follows, to-wit:

Appellant reiterates the grounds in his original motion and makes the following as an amendment and as supplemental thereto:

Appellant would respectfully show to the Court that since he filed his original motion herein, he has made application to the Judge Advocate General's Department for rehearing under Article 53 of the Act of June 24, 1948; that appellant's attorney argued the same before the Judge Advocate General's Department, and on November 3, 1949, the Judge Advocate General's Department overruled the said motion for new trial and gave a written opinion as follows:

After stating the case as contained in the record, the Judge Advocate General reviewed the evidence and based his opinion upon the following:

"7. On 4 October 1949 oral argument of Honorable Hugh Carney, attorney for Whelchel, was heard. Judge Carney likewise represented Whelchel in his habeas corpus action.

"Included with the petition for relief under Article of War 53 are copies of the documents referred to in paragraph 3 of this memorandum. At the oral argument counsel requested that I consider in support of Whelchel's application, the evidence received by the United States District Court in the habeas corpus proceedings.

114 "8. In the petition and by oral argument counsel contends that Whelchel was denied due process of law by the reviewing authority, who did not have Whelchel submit to a neuropsychiatric examination subsequent to the date of his trial and sentence. This was one of the issues decided adversely to accused by the Federal courts. It is also contended that the findings and sentence were unjust because of the doubt as to Whelchel's sanity. Counsel suggested at the oral argument that the court-martial was not properly constituted under

Article of War 8 because the law member was not a member of the Judge Advocate General's Department.

"9. Counsel asserts specifically that the following provision of the Manual for Courts-Martial made it mandatory upon the reviewing authority to require another neuropsychiatric examination of Whelchel upon receipt of the documents referred to in paragraph 3 hereof.

"'The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised.' (MCM, 1928, par. 87b)

"With this contention I cannot agree, since I am of the view that the foregoing language of the Manual is directory only, thus leaving to the discretion of the reviewing authority the action to be taken thereunder. That the reviewing authority acted on the sentence imposed by the court without first having a further examination of the accused was not, in light of the evidence and the record, an abuse of discretion. The letter of defense counsel suggesting a further examination was written six days after the reviewing authority approved the sentence. At the time of approval the reviewing authority had before him the report of the division neuropsychiatrist and the recommendations of the investigating officer and the staff judge advocate heretofore mentioned."

115 From the opinion, it appears that the Judge Advocate General based his decision upon the legal proposition that the language of Article 87b is directory only; whereas, it is the contention of appellant that the language of Article 87b is mandatory and a refusal to apply therewith amounts to want of due process of law.

We quote from the Judge Advocate General's opinion, as follows:

"Counsel's suggestion that the court-martial which tried accused was not constituted in accordance with the requirements of Article of War 8 presumably was predicated upon the holding of the United States Court of Appeals for the Fifth Circuit in the case of *Hiatt* v. *Brown*, 175 F. 2d 273. I do not regard the decision in the Brown case as presently controlling, particularly in view of the contrary holding by the Court of Appeals for the Second Circuit in the case of *Henry* v. *Hodges*, 171 F. 2d 401."

Appellant would respectfully show to the Court that during the argument before the Judge Advocate General, appellant's counsel called to the attention of the Judge Advocate General that since the decision of this Honorable Court in this case was rendered, the same Court had rendered a decision in *Hiatt vs. Brown*, 175 Federal 2d 273; that counsel made inquiry of the Judge Advocate General at said time whether or not the law member in Whelchel's case was a member of the Judge Advocate General's Department and received the reply that the law member was not a member of the Judge Advocate General's Department. As the
116 Judge Advocate General, in his decision, does not set up the fact that, while the law member was not a member of the Judge Advocate General's Department; that there was no member of such department available to act as law member, appellant respectfully represents that there was none, and this case now falls squarely within the provisions of *Hiatt vs. Brown*, 175 Federal 2d 273, and ought to be reversed on those grounds.

WHEREFORE, appellant prays the Court to be allowed to file this amended motion for new trial, and prays the Court that appellant be allowed to present a written brief and oral argument in support thereof; that on final hearing the said motion be granted and the former judgment of this Court be set aside and the judgment of the lower court be reversed and remanded, with directions to declare the judgment of the Court-Martial null and void and to release the appellant from confinement; for such other and further orders in law or in equity to which, in the opinion of the Court, appellant may be entitled.

Respectfully submitted,

HUGH CARNEY,
Atlanta, Texas,
Attorney for Appellant.

117 In the United States Court of Appeals for the Fifth Circuit

No. 12760

MARTON L. WHEECHEL, APPELLANT

versus

A. MCDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION AT TEXARKANA, TEXAS, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Texas

Before HUTCHESON, WALLER, and SIBLEY, Circuit Judges

OPINION DENYING PETITION FOR REHEARING AND MOTION FOR STAY OF JUDGMENT—Filed December 28, 1949

BY THE COURT:

The motion for rehearing and for stay of judgment is hereby denied. We have delayed entering this order in order that appellant might have opportunity to apply to the Judge Advo-
118 cate General under Article of War 53, as amended, 10 U. S. C. A. Sec. 1525, for a new trial. Appellant by an attempt to amend his motion in this court informs us that application has been made to the Judge Advocate General for relief, and has been denied; and he now seeks to add a new ground of attack upon the judgment of conviction which was not presented in the District Court. This we think cannot be done. Moreover the last words of the amended Article of War 53, seem to make the action of the Judge Advocate General refusing a new trial binding upon the courts of the United States. The motion to amend is also denied.

119 In the United States Court of Appeals

[Title omitted]

ORDER DENYING REHEARING AND MOTION FOR STAY OF JUDGMENT

December 28, 1949

It is ordered by the Court that the petition for rehearing and for stay of judgment filed in this cause be, and the same is hereby, denied.

120 Clerk's Certificate to foregoing transcript omitted in printing.

121 Supreme Court of the United States, October Term, 1949

No. 429, Misc.

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR WRIT OF CERTIORARI, ETC.—June 5, 1950.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 866 and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1950 99955 62